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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 8 Original

STATE OF ARIZONA, *Complainant*

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants*

UNITED STATES OF AMERICA, *Intervener*

STATE OF NEVADA, *Intervener*

STATE OF NEW MEXICO, *Impleaded Defendant*

STATE OF UTAH, *Impleaded Defendant*

OPENING BRIEF FOR ARIZONA

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OCTOBER TERM, 1960

No. 9 Original

STATE OF ARIZONA,

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v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

UNITED STATES OF AMERICA,

Intervener

STATE OF NEVADA,

Intervener

STATE OF NEW MEXICO,

Impleaded Defendant

STATE OF UTAH,

Impleaded Defendant

OPENING BRIEF FOR ARIZONA

This case of original jurisdiction comes before the Court in its final stage upon the Report and Recommended Decree

filed by Honorable Simon H. Rifkind, Special Master, and exceptions thereto filed by the parties pursuant to order of the Court dated January 16, 1961.[1]

Since the Report and Recommended Decree are for the most part favorable to Arizona, she moves their adoption by the Court, with such modifications as are requested in her exceptions.

JURISDICTION

Jurisdiction is based on Article III, §2, cl. 2 of the Constitution of the United States and is supported by decisions of this Court, including *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945); *Colorado* v. *Kansas,* 320 U. S. 383 (1943); *Kansas* v. *Colorado,* 206 U. S. 46 (1907); *Kansas* v. *Colorado,* 185 U. S. 125 (1902), and *Missouri* v. *Illinois,* 180 U. S. 208 (1901).[2]

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[1] The Special Master's Report is cited as "Rep."

The transcript of hearings before the Special Master is referred to as "Tr." The hearing exhibits are cited by number preceded by "SM" for the Special Master's; "A" for Arizona's; "C" for California's; "N" for Nevada's; "NM" for New Mexico's; "U" for Utah's; and "US" for those of the United States.

The exceptions to the Master's Report and Recommended Decree are referred to as "Exc." followed by the number of the exception and preceded by the appropriate letter to identify the excepting party (*e.g.*, "A Exc. 13" to cite Arizona Exception 13).

Submitted together with this brief in a separate volume is "Arizona's Legislative History of Sections 4(a), 5(1st paragraph) and 8 of the Boulder Canyon Project Act." This document will be cited "Ariz. Legis. Hist." followed by a page reference. It is substantially identical with "Arizona's Legislative History" submitted to the Special Master except for changes in pagination due to printing. In order that the Court, in reading the Master's Report may be able to refer to the Master's references to "Arizona's Legislative History", Arizona has preserved by bold face bracketed page numbers the pagination of the "Legislative History" as it was submitted to the Master.

[2] As the Special Master noted, the Court's jurisdiction was conceded by all parties (Rep. 129).

STATUTES AND BASIC DOCUMENTS

The case involves:

The Colorado River Compact, executed November 24, 1922, printed as Appendix A.[3]

The Boulder Canyon Project Act, enacted December 21, 1928, effective June 25, 1929, 45 Stat. 1057, as amended, 43 U. S. C. §§617-617u, printed as Appendix B.

The California Limitation Act (Act of March 4, 1929, Ch. 16, 48th Sess.; California Statutes and Amendments to the Codes, 1929, pp. 38-39), printed as Appendix C.[4]

Regulations of the Secretary of the Interior governing water contracts under the Boulder Canyon Project Act, printed as Appendix D.

The Arizona contract with the United States for delivery of water from Lake Mead dated February 9, 1944, effective February 24, 1944, printed as Appendix E.

The Nevada contract with the United States for delivery of such water dated March 30, 1942 and their supplemental contract dated January 3, 1944, printed as Appendices F and G, respectively.

Water delivery contracts between the United States and the defendant California agencies, all of which are essentially similar in form. The Palo Verde Irrigation District contract is a typical example of these and is printed as Appendix H.[5]

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[3] Pages of the Appendices have been numbered page 1a through page 70a. References in the brief to the statutes and other documents printed in the Appendices will be to these page numbers.

[4] The Colorado River Compact, the Boulder Canyon Project Act and the California Limitation Act will be referred to as the "Compact", "Project Act", and "Limitation Act", respectively.

[5] The relevant statutes and executive orders creating federal establishments are too numerous for listing here and printing as appendices to this brief, but they are specifically referred to and, where appropriate, quoted hereafter.

NATURE OF THE ACTION AND PARTIES

Arizona commenced this action by leave of the Court (344 U. S. 919 (1953)) against California and certain political subdivisions of that state[6] to have determined the extent of Arizona's rights to the use of water within the Lower Basin of the Colorado River and its tributaries and for appropriate injunctive relief (Rep. 1-2).

The United States was permitted to intervene (344 U. S. 919 (1953)). Nevada likewise was permitted to intervene (347 U. S. 985 (1954)) and New Mexico and Utah were impleaded on motion of California to the extent of their interests as states of the lower Colorado River Basin (350 U. S. 114 (1955)).

Each party asserts claims to varying amounts of water of the Colorado River System in the Lower Basin.

SCOPE AND DIVISION OF THE BRIEF

As the Special Master noted, the case presents controversies regarding rights to the use of water of the Colorado River and its tributaries within the Lower Basin (Rep. 4-6).

The main stream controversy involves the conflicting claims of Arizona, California, Nevada and the United States to the use of water of the main stream of the Colorado River (Rep. 4-6).

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[6] The defendants Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District and Metropolitan Water District of Southern California are political subdivisions and agencies of the State of California duly organized and existing under the laws of that state. The defendants City of Los Angeles and City of San Diego are municipal corporations organized under the laws of the State of California. The defendant County of San Diego is a county duly created under the laws of the State of California. These defendants and the State of California will be referred to as the California defendants.

The tributary controversy is in two parts: (1) disputes between tributary states and main stream states benefiting from tributary inflow and (2) disputes between tributary states *vis-à-vis* each other and between the United States and tributary states (Rep. 4-6).

The Special Master has reported, quite properly, that there is presently no occasion to apportion water of the tributaries in the Lower Basin between main stream and tributary states (Rep. 316-18).[7]

The controversies regarding tributary uses involve New Mexico, Arizona and the United States as to the Gila and Little Colorado River Systems; Arizona, Utah and Nevada as to the Virgin River System and Arizona and Utah as to Kanab and Johnson Creeks (Rep. 5).

The Special Master has found that there is no justiciable controversy as to any of these tributaries except the Gila River System (Rep. 321-24). Arizona agrees with this conclusion and none of the parties has excepted to it.

Arizona and New Mexico compromised their dispute regarding the Gila River System and the Master adopted their proposed settlement, embodying its terms in his findings and conclusions and Recommended Decree, over the opposition of the United States (Rep. 324-30, 335-43, 354-58).

The United States has filed no exceptions to the findings and conclusions and Recommended Decree of the Special Master with respect to his disposition of the

[7] Since the Special Master concludes that it is neither necessary nor appropriate to determine at this time the rights of main stream states to tributary inflow, we regard as irrelevant and unnecessary his discussion of the principles which may govern the determination of these rights in the future, should the occasion to do so ever arise, and the remedies which may or may not be available to parties to future litigation, if any, involving the attempted enforcement of these asserted rights (Rep. 317-21). Although we disagree with many of the statements made by the Master in the course of his discussion, we do not set forth the grounds of our disagreement, since we regard the discussion itself as irrelevant.

dispute with regard to rights to use water of the Gila River System. New Mexico has taken no "specific" exception to the Report and Recommended Decree of the Special Master. It has, however, reserved its right to file an answering brief in the event its interests are affected (NM Exc. p. 4).

Arizona has filed exceptions to the Master's finding that in withdrawing lands for the Gila National Forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the forest and to his conclusion that the United States has the right to divert sufficient water to satisfy such purposes (Rep. 335, 343, 357-58; A Exc. 29, 30).

Therefore, except for questions regarding the Gila National Forest, this brief is limited to the main stream controversy.

The controversy among Arizona, California and Nevada with respect to their rights in main stream water involves factual and legal considerations different in character from and independent of the controversy between Arizona and the United States with respect to the rights of the federal government in main stream water and water from the Gila River System for the Gila National Forest. Therefore, this brief is divided into two parts.

The questions presented immediately hereafter, the statement of facts, the summary of argument and the first three points of Arizona's argument concern the controversy among the states with respect to main stream water and are dealt with in Part I. In Part II of the brief additional questions and further facts relevant to the controversy concerning the rights of the United States are set forth, together with a summary of argument and argument regarding these questions.

PART I

The Controversy Among Arizona, California and Nevada With Respect to Main Stream Water

PART I

The Controversy Among Arizona, California and Nevada With Respect to Main Stream Water

QUESTIONS PRESENTED

1. Whether Congress in enacting the Project Act allocated among Arizona, California and Nevada all available water in Lake Mead and in the main stream of the Colorado River downstream from Lake Mead; and as subsidiary questions:

A. Whether the Project Act renders principles of equitable apportionment inapplicable to the division of main stream water among Arizona, California and Nevada.

B. Whether the Project Act renders inapplicable the doctrine of prior appropriation as to rights to the use of water of the Colorado River, a navigable stream.

C. Whether §6 of the Project Act, in providing that Hoover Dam and Lake Mead should be used for "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact", recognized or confirmed the existence of intrabasin rights in the Lower Basin to the use of water of the Colorado River, or was intended only to satisfy claims of prior rights in the Lower Basin as against the Upper Basin.

D. Whether, assuming §6 of the Project Act protects or confirms any intrabasin water rights in the Lower Basin, a "present perfected right" within the protection of §6 exists only if it was acquired in compliance with the requirements of state law and only to the extent that it represented, at that time, an actual diversion and beneficial use of a specific quantity of water applied to a definite area of land or to a particular domestic or industrial use.

E. Whether, assuming §6 of the Project Act protects or confirms any intrabasin rights in the Lower Basin, it preserves rights perfected as of November 24, 1922, the date that the Compact was signed, or rights perfected as of June 25, 1929, the effective date of the Project Act.

2. Whether the Project Act and the Limitation Act established an irrevocable and unconditional limitation in perpetuity on California's consumptive use of main stream water in an amount not to exceed 4,400,000 acre-feet of the first 7,500,000 acre-feet of such water available for release from Lake Mead in any one calendar year plus one-half of any such water in excess of that amount; and as a subsidiary question:

A. Whether the reference in §4(a) of the Project Act and in the Limitation Act to "the waters apportioned to the lower basin States" by Article III(a) of the Compact means main stream water only or main stream and tributary water.

3. Whether §§4(a) and 5 of the Project Act established a formula which, in the absence of an interstate compact, governs the apportionment of main stream water among Arizona, California and Nevada and to which the water delivery contracts made by the Secretary of the Interior are required to conform; and as a subsidiary question:

A. Whether the provisions of Article 7(b), (d), (f) and (g) of Arizona's water delivery contract, in so far as they do not conform to the formula established by the Project Act, are invalid.

4. Whether the provisions of Article 7(b), (d), (f) and (g) of Arizona's water delivery contract are invalid as contrary to the provisions of §5 of the Project Act,

which requires that "contracts respecting water for irrigation and domestic uses shall be for permanent service", and as introducing tributary considerations into a main stream apportionment.

5. Whether "consumptive use" means diversion from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation; and as subsidiary questions:

A. Whether each state's apportionment of water is to be measured at the points of diversion.

B. Whether deliveries in satisfaction of the Mexican treaty obligation and reservoir evaporation, channel and other losses sustained prior to diversion are to be treated as diminution of supply.

C. Whether quantities of water released by the Secretary of the Interior from Lake Mead pursuant to orders therefor but not diverted by the party ordering the same are to be considered as diverted by that party, except to the extent that such quantities of water are delivered to Mexico in satisfaction of the Mexican Treaty or are diverted by others in satisfaction of rights decreed herein.

6. Whether water apportioned to a state which will not be used in that state in any year may be released by the Secretary of the Interior for use in another state if such release would result in deliveries of water for use in a state in excess of the quantities permitted by the Project Act, the Limitation Act or the water delivery contracts.

STATEMENT OF THE CASE

The Colorado River System

The main stream of the Colorado River rises in the mountainous regions of north central Colorado where the highest peaks are over 14,000 feet above sea level. Flowing approximately 1,300 miles, the river is the third longest in the United States, exceeded only by the Mississippi River System and the Rio Grande. The Colorado flows 245 miles through western Colorado and then traverses Utah for 285 miles. After crossing the Utah-Arizona boundary, it proceeds southwesterly through the Grand Canyon for 295 miles and forms the Arizona-Nevada boundary for an additional 145 miles. Flowing almost due south, the river forms the California-Arizona boundary for 235 miles and then becomes the international boundary between Arizona and Mexico for a distance of 16 to 20 miles. It then flows 75 miles within Mexico, emptying into the Gulf of California (Rep. 9).

The Colorado River System drains an area of approximately 242,000 square miles in the United States and its basin is comprised of portions of Wyoming, Colorado, Utah, New Mexico, Arizona, Nevada and California, or one-twelfth of the continental United States exclusive of Alaska. The drainage basin from its northernmost point in Wyoming to the Mexican border is approximately 900 miles long and varies in width from about 300 miles in the northerly section to about 500 miles in the southerly section. It is bounded on the north and east by the Continental Divide in the Rocky Mountains, on the west by the Wasatch Range and other divides and by minor divides on the south and southwest (Rep. 9).

Significantly, 107,242 square miles, or more than 94% of the total area of Arizona, are within the drainage basin

of the river and conversely over 44% of the drainage basin lies within Arizona. Also, 100,306 square miles, or 88.5% of the state's total area, are within the drainage area of the Lower Basin of the river and 75.8% of the Lower Basin drainage area of the river is within Arizona (Rep. 10).

In contrast, only 3,599 square miles, or 2.3% of California's total area, are within the drainage basin of the Colorado River and only 1.5% of the drainage basin lies within California. This comparatively small area of the state is in the Lower Basin drainage area of the river and merely 2.7% of the Lower Basin drainage area is within the State of California (Rep. 10).

A canyon approximately 1,000 miles long in southern Utah and northern Arizona divides the basin of the Colorado River System into two natural parts, which are known and will be referred to as the Upper Basin and Lower Basin, respectively (Rep. 11). In both basins most kinds of agriculture can be practiced successfully only by irrigation because of prevailing arid and semi-arid conditions (Rep. 13). The important geographic and climatic differences between the two basins and their particular significance to this case will appear in the course of this brief.

Above the canyon section the basin is at high elevations and the growing season for crops is short, while below the canyon section the irrigable portions of the basin lie at low elevations and the growing season for crops is long, continuing in many places throughout the year. As a result, the extreme aridity and the long growing season of the Lower Basin make its water consumption per irrigated acre relatively high. Losses by evaporation and transpiration are much greater in the lower part of the river system than in the upper (Rep. 12-14).

Systems tributary to the Colorado exist in every basin state except California. The most important of these in the Lower Basin are the Little Colorado in Arizona and New Mexico, the Bill Williams in Arizona, the Gila in Arizona and New Mexico and the Virgin in Nevada, Utah and Arizona (Rep. 11).

The confluence of the Gila with the Colorado occurs between Laguna Dam and Yuma, Arizona, south of all existing diversion structures in the United States. No water emptying from the Gila into the Colorado is diverted or used in California (Rep. 179 note 38; A 114).

The Compact

For many years before 1922, when the Compact was negotiated, the flow of the Colorado River was unpredictable and erratic. Floods menaced and seriously damaged the Lower Basin, particularly in the Yuma area and Imperial Valley. Flood control by storage was essential to protect the Lower Basin (Rep. 20).

Since the water supply from the main stream in the Lower Basin was variant and undependable for irrigation, there was immediate need for storage in the Lower Basin to control the flow of the river in order to assure a regulated water supply. Moreover, the Colorado River carried large amounts of silt which damaged irrigation works and agricultural lands, thus making silt control essential to the protection and development of the Lower Basin (Rep. 20-21).

Water for the Imperial Valley was supplied by a Mexican corporation through the Alamo Canal, which, for the greater part of its length, was located in Mexico. The canal was maintained by the Mexican corporation under a concession granted to it in 1904 by the Republic of Mexico, and the concession required that there be made available for irrigation in Mexico an amount not "exceeding

one-half of the volume of water passing through said canals" (C 137). The Mexican corporation was formed by the developers of Imperial Valley to comply with Mexican law. After the organization of Imperial Irrigation District, its directors became directors of the Mexican corporation. A canal wholly within the United States to provide water for Imperial Valley was recognized as essential to eliminate complications arising from the location of the Alamo Canal in Mexico and from the Mexican concession and to remove the Imperial Valley water supply from Mexican control (Rep. 20).

The demand by the Lower Basin for the construction of storage facilities on the main stream of the Colorado River for its benefit caused apprehension in the Upper Basin states of Colorado, New Mexico, Utah and Wyoming. They recognized that agricultural expansion and other developments in the Upper Basin would be much slower than in the Lower. Because of this, they feared that construction of storage facilities on the main stream of the Colorado River for the benefit of the Lower Basin would permit uses of water there to expand rapidly and form the basis for possible claims of prior appropriative rights, which would prevent long-range development in the Upper Basin (Rep. 22).

Necessity for adjustment of this conflict of interest had been recognized long before 1922. On May 18, 1920, Congress passed the Kincaid Act authorizing and directing the Secretary of the Interior to investigate and report as to the feasibility and advisability of a plan of irrigation development in the Imperial Valley in the State of California. On November 27, 1920, the Director of the Reclamation Service, pursuant to this direction of Congress, transmitted a report on the problems of the Lower Basin to the Secretary of the Interior.

In early 1921, the seven Colorado River Basin states by legislation authorized the appointment of commissioners to negotiate a compact for apportionment of the water supply of the river and its tributaries. Later that year Congress consented that the states might negotiate and conclude a compact which would equitably apportion the water of the Colorado River and its tributaries among the states, on condition that a representative of the United States be appointed by the President to participate in the negotiations and report to Congress on the proceedings and any compact which might result (Rep. 22-24).

The Colorado River Commission, consisting of members appointed by the seven Colorado River Basin states and Mr. Herbert Hoover, representative of the United States, convened on January 26, 1922 (Rep. 24).

On November 24, 1922, an interstate agreement, known as the Colorado River Compact, was executed (Rep. 24).

The Compact represents an accommodation of the conflicting interests of the Upper and Lower Basins for the mutual benefit of both (Rep. 139).

State Action on the Compact

In 1923, the legislatures of the Colorado River Basin states, except Arizona, approved the Compact (Rep. 24).

In 1925, these six states waived the requirement that seven states ratify the Compact and agreed that it should become effective whenever six of the signatory states and Congress should ratify it (Rep. 24-25).

Unsuccessful Federal Legislation, 1922-1927

Between 1922 and 1927, three bills popularly known as the Swing-Johnson bills were successively introduced by Representative Swing and Senator Johnson, both of

California, which would have authorized construction of an All-American canal and a dam at or near Boulder Canyon, but all failed of enactment (Rep. 27).

Unsuccessful Attempts to Make a Lower Basin Compact

From 1925 to 1927, negotiations between Arizona, California and Nevada for a Lower Basin compact dividing among them the water apportioned to the Lower Basin by the Compact were unsuccessful.[8]

The Governors' Conference of 1927

In 1927, the Governors of the seven Colorado River Basin states met to attempt to bring about seven-state ratification of the Compact. The Governors of the Upper Division states suggested by resolution adopted by them at this conference that, out of the average annual delivery of water to be provided by those states at Lee Ferry under the Compact, there be apportioned to Nevada 300,000 acre-feet, to Arizona 3,000,000 acre-feet and to California 4,200,000 acre-feet. They further recommended that each Lower Basin state should have exclusive use of all water of Colorado River tributaries within its boundaries above the place where that water emptied into the main stream. These proposals failed of acceptance primarily because of California's demand that it should be allotted 4,600,000 acre-feet and Arizona's insistence that California be limited to 4,200,000 acre-feet.[9]

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[8] 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. 21-23; 70 Cong. Rec. 171 (1928), Ariz. Legis. Hist. 50-57; 70 Cong. Rec. 333 (1928), Ariz. Legis. Hist. 71-72.

[9] 70 Cong. Rec. 172 (1928), Ariz. Legis. Hist. 50-52; 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. 22-23.

The Project Act

The fourth Swing-Johnson bill,[10] authorizing construction of the All-American Canal and of a dam at or near Boulder Canyon, was introduced in December 1927, passed by the House with amendments and sent to the Senate in May 1928. Senate action in the first session of the Seventieth Congress was prevented by an Arizona-led filibuster. In December 1928, the Senate resumed consideration of the bill, which it passed after extended debate and amendment. Thereafter the bill was adopted by the House without further amendment. It was approved by the President on December 21, 1928, and by its terms was to be known as the "Boulder Canyon Project Act".

Congress in enacting the Project Act authorized construction of a dam in the main stream of the Colorado River at Black Canyon or Boulder Canyon (Hoover Dam) adequate to create a storage reservoir (Lake Mead) with a capacity of at least 20,000,000 acre-feet and construction of the All-American Canal from the Colorado River to Imperial and Coachella Valleys in California (§1, Appendix B, pp. 9a-10a).

The Project Act also approved the Compact (§13(a), Appendix B, pp. 23a-24a).

The Project Act was not to take effect until certain specified conditions precedent had been met: (1) ratification of the Compact by the seven Colorado River Basin states within six months from the date of the passage of the Act or, if seven states failed to ratify within the six-month period, (2) ratification by six of those states, including California, a waiver by each ratifying state of the Compact requirement of seven-state ratification and enactment by the California legislature of the Limitation Act (§4(a), Appendix B, pp. 12a-13a).

[10] H.R. 5773 and S. 728, 70th Cong., 1st Sess. (1927).

The Limitation Act

The Compact was not ratified by the seven Colorado River Basin states within six months after passage of the Project Act, although six states, including California, ratified within that time and waived seven-state ratification (Rep. 25-26, 166).

On March 4, 1929, the California legislature enacted the Limitation Act which, in compliance with the conditions prescribed by the Project Act for its effectiveness, accepted the limitations imposed therein upon the use in California of water "of and from the Colorado River" (Rep. 26, 180-82; Appendix C, pp. 27a-28a).

Presidential Proclamation

On June 25, 1929, the President proclaimed the Project Act to be effective. His proclamation declared that (a) there had not been seven-state ratification of the Compact within six months of passage and approval of the Project Act; (b) there had been six-state ratification of the Compact and waiver by the ratifying states of the requirement of seven-state ratification; (c) the requirements of §4(a) of the Project Act necessary to render the Act effective had been met by California and (d) all prescribed conditions for effectiveness of the Project Act had been fulfilled (Rep. 26-27).

Construction of Hoover and Imperial Dams and the All-American Canal

Pursuant to authorization of the Project Act, Hoover Dam was constructed in Black Canyon in the main channel of the Colorado River 330 miles above the Mexico-California border. The middle of the channel at the site is the boundary between Nevada and Arizona. Construction was initiated September 17, 1930, water first impounded February

1, 1935 and power first generated September 11, 1936. The dam is the principal structure of the Lower Basin development, impounding the water of the Colorado River to create a huge reservoir called Lake Mead, which has a maximum length of 115 miles and a maximum width of 8 miles. The original unsilted storage capacity of Lake Mead was 32,359,000 acre-feet and its maximum surface area is 162,700 acres. Its present usable capacity is approximately 27,200,000 acre-feet. Title to Hoover Dam is in the United States and it is operated and maintained by the Department of the Interior (Rep. 32-33).

Also pursuant to authority of the Project Act, Imperial Dam was built in the main channel of the Colorado River 303 miles below Hoover Dam and 18 miles above Yuma, Arizona. The thread of the stream at the dam site constitutes the boundary between Arizona and California. Imperial Dam is the diversion point for the All-American Canal and for the Gila Project and the Yuma Auxiliary Project in Arizona. Title to the dam is in the United States and it is operated and maintained by the Department of the Interior (Rep. 35-36).

The All-American Canal was built under authority of the Project Act primarily to carry Colorado River water from Imperial Dam to the Imperial and Coachella Valleys in California (Rep. 36-37).

Regulations of the Secretary of the Interior Governing Water Contracts

After the Project Act became effective, the Secretary of the Interior in 1930 promulgated general regulations under which the United States would contract for storage and delivery of main stream Colorado River water. These regulations required contracts for domestic and irrigation uses to be for permanent service and to conform to §4(a)

of the Project Act and that all contracts for delivery of water be subject to the terms and conditions of the Compact and Project Act (Appendix D, pp. 29a-33a).

The California Contracts and Seven-Party Agreement

From time to time the Secretary of the Interior entered into contracts on behalf of the United States with the California defendants for delivery of an aggregate of 5,362,000 acre-feet of water annually from Lake Mead, subject to the availability of such water under the Compact and the Project Act (Rep. 207-08; see, *e. g.*, Appendix H, pp. 59a-70a).

By agreement of August 18, 1931 (the Seven-Party Agreement, which is incorporated in all the California contracts, see, *e. g.*, Appendix H, pp. 59a-70a), the various California agencies established intrastate priorities to the use of Colorado River water as follows:

1. A first priority to Palo Verde Irrigation District for water for 104,500 acres.

2. A second priority to the Yuma Project in California for water for 25,000 acres.

3. A third priority to Imperial Irrigation District, Coachella Valley and Palo Verde Irrigation District for 3,850,000 acre-feet less the quantities under the first and second priorities.

4. A fourth priority to Metropolitan Water District for 550,000 acre-feet.

5. A fifth priority to Metropolitan Water District for 550,000 acre-feet and to San Diego for 112,000 acre-feet.

6. A sixth priority to Imperial and Coachella Valleys and to the Palo Verde Irrigation District for 300,000 acre-feet.

7. A seventh priority for agricultural use for all water remaining for use in California.

The Special Master has held that "the 5,362,000 acre-feet for which California users have contracted must be satisfied as follows: 4,400,000 acre-feet out of the first 7,500,000 acre-feet; and 962,000 acre-feet out of surplus" (Rep. 224 note 85).

The Nevada Contracts

By contracts dated March 30, 1942, and January 3, 1944, respectively, the United States agreed to deliver annually to Nevada from Lake Mead so much water, including all other waters diverted for use within Nevada from the Colorado River System, as might be necessary to supply the state with a total quantity of not to exceed 300,000 acre-feet per annum, subject to the availability of such water under the Compact and the Project Act (Rep. 28, 209-10; Appendices, F, G, pp. 45a-58a).

Arizona's Ratification of the Compact

On February 24, 1944, Arizona unconditionally ratified the Compact by Act of its legislature, effective as of that date (Rep. 27).

The Arizona Contract

By contract dated February 9, 1944, effective February 24, 1944, the United States agreed to deliver annually to Arizona and its water users from storage in Lake Mead so

much water as might be necessary for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet plus one-half of the surplus water unapportioned by the Compact, subject to the availability of such water under the Compact and the Project Act (Rep. 29, 205-06).

Article 7(b) of the Arizona contract (Appendix E, p. 37a) provides in part that deliveries to Arizona of unapportioned water shall be "less such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article". In subdivision (f) (Appendix E, p. 38a) Arizona "recognizes the right" of the United States and Nevada to contract for annual beneficial consumptive use within Nevada for agricultural and domestic uses of one-twenty-fifth "of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact . . . ." By subdivision (g) (Appendix E, p. 38a) Arizona "recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact . . . ."

The Arizona contract further provides in Article 7:

> "(d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead . . . ."

Circumstances Requiring Adjudication of Arizona's Rights

Since Arizona is an arid state, irrigation is essential to its successful agriculture and water is needed for domestic, municipal and industrial purposes. The state has no

substantial surface water supply except from the Colorado River System (A 1000, pp. 7-8).

In the central part of Arizona, consisting primarily of Maricopa and Pinal Counties, the water supply is inadequate to meet existing demands and maintain present economic development (A 64, p. 11; A 136). Since 1940, there has been rapid and continuous lowering of the groundwater table in central Arizona (A 145, 159, 391, 392) and as a result wells in some areas have gone completely dry, while in others further pumping has become economically impractical. In prospect these conditions will grow progressively worse (Tr. 1458, 1539-41, 1641, 1660, 2010, 2012-14).

There has been an alarming decrease in acreage under cultivation in central Arizona. In 1952, agricultural lands irrigated in Maricopa and Pinal Counties aggregated 875,500 acres. By 1955, this total had declined by more than 100,000 acres (A 136, Tables for 1952 and 1955) and, unless a supplemental water supply is provided, the maximum of irrigated lands which can be permanently maintained in these two counties is between 450,000 and 500,000 acres (Tr. 1476-83).

The main stream of the Colorado River is the only available source of water to supplement the local water supply in central Arizona (A 65, p. 3, par. 15; A 71, p. 115, par. 15).

In 1944, the United States Bureau of Reclamation in cooperation with Arizona began active investigation and planning of what is known as the Central Arizona Project, designed to bring supplemental water from the main stream of the Colorado River to a portion of the central Arizona area suffering from an inadequate water supply (Rep. 30). On September 16, 1948, the Secretary of the Interior

reported to Congress that this project was feasible and that there was urgent need in central Arizona for water from the Colorado River, which the project would make available (Rep. 30; A 70). The Secretary also reported that California challenged Arizona's claims to the water which the Central Arizona Project would divert and that if California's contentions were correct there would be no dependable water supply available from the Colorado River for diversion to central Arizona (Rep. 30, 130).

During the Seventy-Ninth and succeeding Congresses through the Eighty-Second Congress, Arizona sought congressional authorization for construction of the Central Arizona Project and met with vigorous resistance by the California defendants, who claimed Arizona had not shown there was any water of the Colorado River System available for use in Arizona in addition to that in use or required for Arizona projects already authorized (Rep. 31, 130).

The Senate approved this legislation in the Eighty-First and Eighty-Second Congresses. However, on April 18, 1951, the House of Representatives Committee on Interior and Insular Affairs adopted a resolution that consideration of bills relating to the Central Arizona Project "be postponed until such time as use of the water in the Lower Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the water is reached by the states of the Lower Colorado River Basin" (Rep. 31, 131).

In 1952, Arizona made a motion for leave to file its Bill of Complaint, which was granted on January 19, 1953 (344 U. S. 919), and the Bill of Complaint was filed that day (Rep. 1, 31, 131).

SUMMARY OF THE ARGUMENT

I. The Water Dealt With by the Project Act and the Limitation Act

Neither construction of Hoover Dam nor the vast benefits resulting from its operation, which have been and will continue to be enjoyed by the parties to this action, could have been realized without the authorization of Congress. That authorization was given in the Project Act by Congress in the exercise of its plenary power over navigable waters.

The Project Act did not become effective, however, until certain conditions precedent, explicitly set forth in §4(a) of the statute itself, had been fulfilled. These conditions were: (A) ratification of the Compact within six months after June 25, 1929, the effective date of the Act, by all seven Colorado River Basin states; (B) failing such seven-state ratification (a) approval of the Compact by six states, including California, and their waiver of the Compact requirement that seven states ratify; (b) enactment by California of the Limitation Act and (c) presidential proclamation of the effectiveness of the Project Act.

Seven-state ratification of the Compact within the prescribed six-month period did not occur. But the alternative conditions laid down by Congress for effectiveness of the Project Act were met in every respect (Rep. 26-27).

In specifying the conditions for effectiveness of the Project Act, Congress required that California should

> " . . . agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggre-

> gate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact." Project Act §4(a)

California complied with this condition by enactment of the Limitation Act which, in terms practically identical with those of the Project Act, provided that

> " . . . the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming as an express covenant and in consideration of the passage of the said 'Boulder canyon project act' that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado river for use in the State of California including all uses under contracts made under the provisions of said 'Boulder canyon project act,' and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph 'a' of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact." Limitation Act §1

The Special Master concluded that the provisions, general operative scheme and legislative history of the Project Act establish that both §4(a) of the Project Act and the Limitation Act refer only to water in Lake Mead and flowing in the main stream below Hoover Dam (Rep. 138, 151-52, 173-83). Therefore, he found that the phrase, "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact", was intended by Congress to refer only to water in the main stream, and not to water of tributaries. Hence, when Congress thus made reference to the 7.5 million acre-feet per annum apportioned to the Lower Basin by Article III(a) of the Compact, Congress was dealing with main stream water only, *i.e.*, water in Lake Mead and in the main stream below Hoover Dam; and consequently, by virtue of §4(a) of the Project Act and the Limitation Act, California is limited to 4.4 million acre-feet of that water (Rep. 173 *et seq.*).

In addition, the Special Master concluded that Congress considered the limitation on California to be part of an overall allocation of the entire quantity of water dealt with in §4(a) among three states only: of the first 7.5 million acre-feet available in each year, 4.4 to California, 2.8 to Arizona and .3 to Nevada and the balance in excess of 7.5 million acre-feet to California and Arizona equally (Rep. 174).

Arizona agrees with these conclusions of the Special Master and urges their adoption by the Court.

The Master reached these results solely on the basis of the terms, purposes and legislative history of the Project Act. He considered, and we agree, that the Compact has utility as a decisive factor in this case only insofar as it serves to determine the supply of main stream water legally available in the Lower Basin and that the Compact

is not relevant to the allocation of water from Lake Mead and from the main stream of the river below Hoover Dam among Arizona, California and Nevada (Rep. 138-41).

It makes little difference, therefore, whether the apportionment provisions of Article III(a) of the Compact refer to main stream water only, as Arizona contends (A Exc. 3), or whether those provisions cover both main stream and tributary water, as the Master construes them (Rep. 173). Whatever may be the correct interpretation of Article III(a), considered independently and apart from the Project Act, it is the construction put upon Article III(a) by Congress in enacting the Project Act, which made the Compact effective, and that construction alone, which is controlling.

As the Special Master has found, the evidence is clear that Congress, in enacting §4(a), intended to provide for the apportionment of main stream water exclusively—not water ~~of tributaries~~ as well (Rep. 173 *et seq.*).

By referring in §4(a) to provisions of Article III(a) of the Compact, either Congress construed those provisions as dealing with main stream water only, or, if it regarded them as including tributaries, it in effect modified the terms of the Compact referred to by limiting their application to main stream water.

In either event, the effect of §4(a) and the Limitation Act is to restrict California to the annual consumptive use of 4.4 million acre-feet of water from the main stream of the Colorado River plus one-half the excess or surplus above the first 7.5 million acre-feet of such water available in any one year for use in the Lower Basin.

II. The Statutory Apportionment

Section 4(a) of the Project Act, in addition to requiring limitations on California's use of main stream water as a

condition precedent to its effectiveness, authorized Arizona, California and Nevada to enter into an agreement which should provide, among other things:

> "(1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact. . . ."

No such interstate compact has been made.

Section 5 of the Project Act, after authorizing the Secretary of the Interior to contract for the storage and delivery of water in Lake Mead, provides:

> "Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

Section 8(b) authorized Arizona, California and Nevada, or any two of them, to provide by compact for an equitable division of Colorado River water on different terms from those suggested by Congress in §4(a), subject to congressional approval and consent, but provided that any such compact should be subordinate to the Secretary's water delivery contracts made prior to congressional approval of the compact (Appendix B, p. 20a).

The Special Master has found that by these provisions Congress authorized the Secretary of the Interior to enter

into water delivery contracts which, in the absence of an interstate compact, would control the allocation of main stream water among Arizona, California and Nevada (Rep. 99-100, 152-54, 201). But the Master has rejected Arizona's contention that §4(a) establishes a mandatory formula of water allocation which the Secretary is required "precisely to follow" in his water delivery contracts (Rep. 162-63).

Arizona adheres to her position before the Special Master and urges its adoption by the Court (A Exc. 7, 8). It is Arizona's contention that all contracts made by the Secretary pursuant to the authority granted him by §5 of the Project Act must conform to the formula for the allocation of water established by §4(a). The formula of water allocation established by §§4(a) and 5 does not leave to the Secretary's discretion the determination of the quantity of water to be delivered within each state pursuant to contract. The statute fixed a formula for the apportionment of water stored in Lake Mead among the states of Arizona, California and Nevada and this formula is mandatory upon the Secretary and controls his water delivery contracts.

As a corollary, it follows that Arizona's existing water delivery contract, insofar as it does not conform to the formula established by the Project Act, is beyond the contractual competence of the contracting parties, exceeds the authority of the Secretary and is without legal effect (A Exc. 7).

Furthermore, the provisions of Article 7(b), (d), (f) and (g) of Arizona's water delivery contract are invalid because they are contrary to the provision of §5 of the Project Act, which requires that "contracts respecting water for irrigation and domestic uses shall be for permanent service", and because they introduce tributary considerations into a main stream apportionment (A Exc. 8).

III. Appropriative and "Perfected Rights"

The Project and Limitation Acts and the Secretary's water delivery contracts made pursuant thereto complete the "statutory apportionment" among Arizona, California and Nevada of main stream water in Lake Mead and downstream from Lake Mead (Rep. 100, 138, 152). Arizona agrees with the Special Master's holding that "this case involves a statutory, not an equitable, apportionment" of water (Rep. 100) and that "the doctrine of equitable apportionment, and the law of appropriation are . . . irrelevant to the allocation of such water among the three states." (Rep. 138; see Rep. 152).

Congress, by virtue of the structures erected under authority of the Project Act, has impounded substantially all the water of the main stream of the Colorado River (Rep. 153). Congress has done this in the exercise of its dominion and plenary power over navigable waters of the United States.

Assuming that appropriative rights in the use of the water of the Colorado River had vested before the Project Act, the enactment of the statute divested them in the absence of a congressional intention that they be recognized and preserved.

The Special Master has found that §6 of the Project Act (Appendix B, pp. 18a-19a) was intended to protect water rights in the main stream of the Colorado River within the Lower Basin states "perfected" as of June 25, 1929 (the effective date of the Act), against possible shortages in the water apportioned to the Lower Basin by the Compact (Rep. 234, 308-13).

Arizona disagrees (A Exc. 5, 6). The clause in §6—"satisfaction of present perfected rights in pursuance of

Article VIII of said Colorado River compact''—was intended to comply with the provisions of Article VIII, which discharged the Upper Basin from claims of "rights, *if any,* by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin''[11], after storage capacity of 5,000,000 acre-feet had been provided in the main Colorado River within or for the benefit of the Lower Basin. In short, Article VIII provides for satisfaction of perfected rights only basin versus basin and makes no provision for satisfaction of intrabasin rights. Congress intended in §6 of the Project Act to meet the requirements of Article VIII of the Compact for the protection of the Upper Basin, and nothing more.

Assuming, however, that the Master's construction of §6 is correct, Arizona agrees with his conclusion that the protection there provided covers only rights acquired in compliance with state law and is effective only to the extent that such rights represent actual diversions and beneficial use of specific quantities of water applied to defined areas of land or to particular domestic or industrial uses (Rep. 308).

Further, it is Arizona's position that the term "present perfected rights'' refers only to those rights which were perfected as of November 24, 1922, the date the Compact was signed, and not as of June 25, 1929, the effective date of the Project Act. Arizona asserts that the Compact speaks as of the date it was signed rather than as of the date it was confirmed and approved (A Exc. 6).

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[11] Unless otherwise indicated, italics appearing in quotations in this brief have been added for emphasis.

ARGUMENT

I

Congress in enacting the Project Act exercised its plenary power over navigable water and allocated among Arizona, California and Nevada all available water in Lake Mead and in the main stream of the Colorado River downstream from Lake Mead. Therefore, principles of equitable apportionment and priority of appropriation are not applicable to the division of main stream water among those states.

A. The Constitutional Power of Congress Over Navigable Waters

The power of Congress over navigable waters is so complete and absolute as to amount to "dominion". As this Court stated in its most recent pronouncement upon the subject:

> "It is no longer open to question that the Federal Government under the Commerce Clause of the Constitution (Art. 1, §8, cl. 3) has dominion, to the exclusion of the States, over navigable waters of the United States."

Tacoma v. *Taxpayers of Tacoma,* 357 U. S. 320, 334 (1958). See also *United States* v. *Willow River Power Co.,* 324 U. S. 499 (1945); *United States* v. *Appalachian Electric Power Co.,* 311 U. S. 377, 423-24 (1940); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53 (1913); *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690 (1899); *Gibson* v. *United States,* 166 U. S. 269 (1897).

The plenary power of Congress over navigable waters was analyzed by Justice Douglas in *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224-25 (1956):

> "The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude' (see *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, 391; *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, 249) or 'a superior navigation easement'. *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 736. The legislative history and the construction of particular enactments may lead to the conclusion that Congress exercised less than its constitutional power, fell short of appropriating the flow of the river to the public domain, and provided that private rights existing under state law should be compensable or otherwise recognized. Such were *United States* v. *Gerlach Live Stock Co.*, *supra*, and *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, *supra*. We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose."

The Court has held time and again that "the flow of a navigable stream is in no sense private property"; that therefore the United States could take over a power project on a navigable river privately operated under state license, *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 424 (1940); and that Congress may decide conclusively, as a purely legislative question, whether the entire flow of a navigable stream should be conserved for

the use and safety of navigation, *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913).

Considering the conflict between so-called water "rights" of riparian owners on the one hand and operations of the federal government in aid of navigation on the other, the Court stated in *United States* v. *Willow River Power Co.*, 324 U. S. 499, 510 (1945):

> "Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all."

In summary, as against the power of the United States under the Commerce Clause, there are no private property rights in the waters of a navigable stream. This is true whether the asserted "rights" are claimed to be riparian or appropriative in character. See *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690 (1899); *Gibson* v. *United States*, 166 U. S. 269 (1897).

All rights to the use of water of navigable streams, whether claimed by sovereign states or private users, are subservient to the plenary power and dominion of the United States under the Commerce Clause. Congress in the exercise of this power and dominion may abolish, limit or preserve, as it deems fit, pre-existing rights to the use of navigable water. In any case, when such claims of right are affected by the exercise of this federal control,

the question as to the extent of the effect upon them is not a question of power but one of congressional intent.

Therefore, in the case at bar, assuming the existence of appropriative or riparian rights in the main stream of the Colorado River prior to enactment of the Project Act, reference must be made to the terms, purposes and legislative history of the statute in order to determine its effect on those asserted rights.

B. Provisions of the Project Act

In the enactment of the Project Act, Congress realized that the dam authorized by the Act would impound substantially all the water in the main stream of the river at the dam site and that the water impounded would be stored in Lake Mead (Rep. 153). The situation here is akin to that in *United States* v. *Twin City Power Co.*, 350 U. S. 222, 225 (1956)—"one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose."

The public purposes to be served by the authorized dam and reservoir are clearly set forth in the Project Act. Exercising its plenary power over the river, a navigable stream, Congress authorized the Secretary of the Interior

> "to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty-million acre-feet of water"

for

> "the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the

> United States, and for the generation of electrical energy. . . ." Project Act §1

Congress directed that the dam and reservoir should be used:

> "First, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses . . . and third for power." Project Act §6

It provided that title to the dam, reservoir, plant and incidental works should forever remain in the United States and that the United States should, until otherwise provided by Congress, control, manage and operate them (§6, Appendix B, pp. 18a-19a).

Congress further provided that the water thus impounded and stored should be placed under the control of the Secretary of the Interior, subject to specific limitations on his authority prescribed by the Project Act. As sole administrator of the statute and operator of the dam and reservoir, the Secretary is empowered to retain or to release the impounded and stored water so as to achieve the enumerated purposes of the statute in the order of their priority. He can release water from Lake Mead for irrigation and domestic purposes, but only after the superior needs of navigation, flood control and river regulation have been served.

The Special Master has concluded that the Project Act is the source of authority for the allocation and delivery of water to Arizona, California and Nevada from Lake Mead and from the Colorado River below Lake Mead (Rep. 151).

Section 5 authorizes the Secretary "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof

at such points on the river . . . as may be agreed upon, for irrigation and domestic uses . . . ." To make its intention abundantly clear, Congress declared in §5 that: "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract as herein stated." Section 5 also provides that: "Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act." The intention to exert authority over the allocation and distribution of water stored in Lake Mead is likewise manifested in §8(b) of the Act. That section contemplates that Arizona, California and Nevada, or any two of them, may negotiate a compact for a division of Colorado River water but provides that this compact shall be subject to water delivery contracts made by the Secretary of the Interior prior to congressional approval of the compact (Rep. 151).

We agree with the Special Master that the terms of the Project Act, together with the general operational scheme established in the Act and the purposes of the Act explicated in the legislative history

> "make it clear that the Project Act was designed by Congress to establish the authority for an allocation of all of the available water in Lake Mead and in the mainstream of the Colorado River downstream from Lake Mead among Arizona, California and Nevada. . . . As to this water, principles such as equitable apportionment or priority of appropriation which might otherwise have controlled the interstate division of the River in its natural flow condition were rendered inapplicable by the Project Act." (Rep. 152) (footnote omitted)

Whether the Project Act is viewed as itself laying down a formula for the division of main stream water

among Arizona, California and Nevada to which the Secretary is required precisely to conform in his water delivery contracts, as Arizona contends (see pp. 83-99, *infra;* A Exc. 7, 8), or is construed as conferring upon the Secretary certain discretionary powers in the division of such water, as the Special Master holds (Rep. 161-63), in either event the Project Act is the source of authority for the division of main stream water and there is no occasion for the application of principles of equitable apportionment.

C. Legislative History

That Congress intended to provide in the Project Act for the allocation of stored water among Arizona, California and Nevada is demonstrated by the legislative history of the Act. Indeed, as the Special Master concluded:

> "The congressional debates are almost unintelligible except on the premise that the legislators considered that they were providing, in the Project Act itself, the authority for the allocation of impounded water among the states." (Rep. 154)

Senator Pittman of Nevada clearly considered that an apportionment was being made by the provisions of the Project Act. Discussing the Phipps amendment, he stated:

> "The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only . . . 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get. . . ."[12]

[12] 70 Cong. Rec. 468 (1928), Ariz. Legis. Hist. 123.

Since California would be limited to 4.4 million acre-feet of the 7.5 million dealt with by §4(a), and Nevada could use only 300,000 acre-feet, the remainder of 2.8 million was to go to Arizona, and the Senate so understood. Thus Senator Pittman concluded:

> ". . . Arizona to-day has practically allocated to it 2,800,000 acre-feet of water in the main Colorado River."[13]

Although, as we have seen, Congress suggested in §4(a) what it considered to be an equitable allocation of stored water which might be accomplished by an interstate compact among Arizona, California and Nevada, it had no intention of leaving the water in storage unallocated among these states should they fail to agree. The patience of Congress had been worn thin by the protracted controversy among the Lower Basin states over the water of the Colorado River. As Senator Pittman reminded the Senate:

> "Mr. President, this question has been here now for seven years. The seven States have been attempting to reach an agreement. Apparently the Senate of the United States is about to reach an agreement as to what ought to be done. The Senate has already stated exactly what it thinks about the water. That might have been an imposition on some States. Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason."[14]

Senator Hayden of Arizona, who like Senator Pittman, was one of the architects of the Project Act, emphasized a

[13] 70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. 126.

[14] 70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. 130.

number of times that the bill provided for the apportionment of water among Arizona, California and Nevada regardless of interstate priorities, but that it would not affect intrastate water rights. Senator Hayden stated:

> "The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts."[15]

The amendment referred to by Senator Hayden was eventually enacted with certain modifications as the second paragraph of §4(a) of the Project Act.

The Congressional Record is replete with many instances of a recognition and realization by the Senate that the statute under consideration, if enacted, would be the authority for the division of water among the three states involved (pertinent excerpts are set forth at pp. 58-67, 90-99, *infra*).

On the basis of its language and legislative history the Master concluded that the Project Act is "the source of authority for the allocation and delivery of water to Arizona, California and Nevada from Lake Mead and from the Colorado River below Lake Mead" (Rep. 151). This conclusion is wholly justified and indeed inescapable.

D. Inapplicability of Principles of Equitable Apportionment

Finding that Congress intended the Project Act to be the source of authority for the division of main stream water among the three Lower Basin states, the Master held that the doctrine of equitable apportionment and the law of prior appropriation are irrelevant to the allocation of such

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[15] 70 Cong. Rec. 169 (1928), Ariz. Legis. Hist. 45.

water among the three states (Rep. 138). This conclusion is obviously correct.

The provisions for the apportionment of water made by Congress in the Project Act and carried out by the Secretary of the Interior in his water delivery contracts render wholly inapplicable to the main stream interstate controversy presented by this case principles of equitable apportionment applied by this Court in other cases involving interstate water controversies. In those cases no apportionment had been authorized by Congress.[16] As the Master emphasized:

> "This case involves a statutory, not an equitable, apportionment. . . ." (Rep. 100)

E. Effect on Appropriative Rights

The statutory apportionment made by the Project Act also renders inapposite the law of prior appropriation (Rep. 138).

Recognition of and delivery of water pursuant to "appropriative rights", as those terms are defined and employed in water law, is wholly incompatible with the apportionment of water authorized by the Project Act.

Furthermore, management and control of the reservoir and dam for the primary purposes of improvement of navigation, flood control and river regulation necessarily preclude the operation of those works and structures to meet demands for delivery of water at the times and in the quantities required to satisfy appropriative rights. If the Secretary in managing the reservoir and dam were compelled to meet the demands of appropriative rights in point of time and quantity, it would be impossible for him to comply with the mandate of the Project Act that "the dam and reservoir

[16] See, *e.g.*, *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945); *Wyoming* v. *Colorado*, 259 U. S. 419 (1922).

. . . be used: First, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses . . .; and third, for power" (§6).

These consequences would arise from the very nature of an appropriative right. The appropriator of water is entitled, as against all subsequent claimants, to the exclusive use of the water to the extent of his appropriation, without diminution or material alteration in quantity or quality. Since appropriations vest according to and are limited by time as well as volume, an appropriator is under the obligation to divert his water at the time and in the quantities fixed when his right was established, if his failure to do so will impair rights of other appropriators. *Santa Paula Waterworks* v. *Peralta,* 113 Cal. 38, 45 Pac. 168 (1896); *Galiger* v. *McNulty,* 80 Mont. 339, 260 Pac. 401 (1927); *Davis* v. *Chamberlain,* 51 Ore. 304, 98 Pac. 154 (1908); 2 KINNEY, THE LAW OF IRRIGATION AND WATER RIGHTS 1369-73 (2d Ed. 1912); 1 WIEL, WATER RIGHTS IN THE WESTERN STATES 318 (3d Ed. 1911).

A construction of the Project Act which would require the Secretary to ascertain priority rights on the river, both as to time of vesting and quantity of water, and to manage the dam and reservoir so as to respect and satisfy these varying rights would be inconsistent with and frustrative of the clear intent of Congress expressed in the plain language of the Act.

These conclusions are supported by the legislative history of the Project Act. As introduced in the 69th Congress, §5 of the third Swing-Johnson bill provided in part that "contracts respecting water for domestic uses may be for permanent service but subject to rights of prior appropriators."[17] However, the clause subjecting contracts to prior appropriative rights was deleted in committee,

[17] H.R. 9825, 69th Cong., 2d Sess. (1926), Ariz. Legis. Hist. 5.

the permissive provision, "may be for permanent service", was stricken and the mandatory provision, "shall be for permanent service", was substituted.[18] At the same time that Congress deleted the provisions recognizing rights of prior appropriators, it added the following requirement:

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."[19]

Congress, by refusing recognition to appropriative rights and by denying any right to the use of water except by contract, evidenced a clear intent that appropriative rights should not be recognized as the basis of any claim to water stored in Lake Mead.

The legislative history further shows that Congress intended that in contracting for delivery of stored water the Secretary should be free to ignore prior appropriations. During a discussion of the effect of the Project Act on claimed appropriative rights, the following exchange occurred between Senator Johnson of California and Senator Walsh of Montana:

> "Mr. Walsh of Montana. If the City of Los Angeles has this enormous appropriation of the waters of the Colorado River, a perfected appropriation or an inchoate appropriation, does it follow, if the Government erects this dam across the Colorado River and creates a great storage basin, that it must yield up that amount of water to the city of Los Angeles?
>
> "Mr. Johnson. I rather think so, just exactly as if it were a perfected right for irrigation purposes.
>
> "Mr. Walsh of Montana. Yes; but I always understood that the interest that stores the water

[18] Ariz. Legis. Hist. 6.

[19] *Ibid.*

has a right superior to prior appropriations that do not store.

"Mr. Johnson. Possibly so. What is the point?

"Mr. Walsh of Montana. The point is that apparently, if that is correct, then this expenditure is being made with no right in the Government of the United States to control the water which is stored, but that it must go to those appropriators.

"Mr. Johnson. No; the bill provides that a contract in advance must be made for the storage of water by the Secretary of the Interior.

"Mr. Walsh of Montana. A contract with whom?

"Mr. Johnson. With those who utilize and take and appropriate the water.

"Mr. Walsh of Montana. That is to say, the Government may dispose of the stored water as it sees fit?

"Mr. Johnson. Yes; under the terms of this bill.

"Mr. Walsh of Montana. Then how can it be said that the city of Los Angeles has a perfected interest?

"Mr. Johnson. It has a perfected right there unquestionably, but the bill requires the city of Los Angeles to conform to it, and the city of Los Angeles is perfectly willing to conform to it just exactly as if it had no perfected right.

"Mr. Walsh of Montana. Am I correct in the assumption that the Government of the United States must distribute the water to the various appropriators in accordance with their several appropriations?

"Mr. Johnson. If they contract.

"Mr. Walsh of Montana. Yes; but to contract means a liberty of contract. That is what I want to know. Can the Secretary give the water to them or withhold it from them as he sees fit?

"Mr. Johnson. Certainly, because before he begins work upon the dam he has to have the con-

tract in his possession for its payment, and he is the one who is to fix the sums that are to be paid.

"Mr. Walsh of Montana. Yes, but that is quite contradictory. It seems to me that the City of Los Angeles has no rights by virtue of this appropriation.

"Mr. Johnson. Certainly it has, but those rights unquestionably will be controlled by this bill.

* * * * * * *

"Mr. Walsh of Montana. I directed the inquiry merely for the purpose of trying to find out, if I can, under what kind of obligation the Government of the United States, should it build this dam, would be to those who have the appropriations.

"Mr. Johnson. The Government would be under no obligations until it makes its terms. I seem unable to make that plain. But here is everything in this scheme, plan, or design: Everything is dependent upon the Secretary of the Interior contracting with those who desire to obtain the benefit of the construction, and he is not to undertake any expenditure nor to undertake any construction until that shall have been accomplished.

"Mr. Walsh of Montana. Let us suppose the Arizona people are perfectly willing to meet the requirements and that the Los Angeles people are perfectly willing to meet the requirements, and other people who have not even attempted to make any appropriation are perfectly able and willing to meet the requirements. Who then has the right?

"Mr. Johnson. The Secretary of the Interior and the Government have the right.

"Mr. Walsh of Montana. The Secretary of the Interior may utterly ignore those appropriations?

"Mr. Johnson. Possibly so.

"Mr. Walsh of Montana. That is what I am curious to find out about."[20]

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[20] 70 Cong. Rec. 168 (1928), Ariz. Legis. Hist. 40-43.

Thus it is clear that it was the understanding and intent of Congress that rights to the use of stored water could be obtained only by contract with the Secretary of the Interior and that claims of appropriative rights would be without effect. Congress, in the exercise of its plenary control over the river, could have withheld all the water from users in the Lower Basin. It did not see fit to do this. Instead, it authorized the Secretary by §5 to contract for the delivery of water within the limits prescribed by §4(a) without regard to perfected or inchoate appropriative rights.

The evidence is uncontradicted that, since construction of Hoover Dam, the reservoir and dam have been operated consistently without regard to claimed appropriative rights (Tr. 828-29). The record is clear that no water users in California or elsewhere have demanded the release of water in accordance with and in satisfaction of asserted appropriative rights.

This practical construction reflects a realization on the part of all concerned that since enactment of the Project Act rights to stored water have as their basis the Act and the water delivery contracts, if made pursuant thereto, rather than any prior appropriations of water.

F. "Present Perfected Rights"

Congress in §6 of the Project Act (Appendix B, pp. 18a-19a) directed that Hoover Dam be operated in "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact. . . ." Article VIII of the Compact provides:

> "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the

> Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.
>
> "All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

The Special Master has construed §6 of the Project Act as preserving whatever rights to main stream water in Arizona, California and Nevada were perfected when the Project Act became effective on June 25, 1929.[21]

We disagree (A Exc. 5) with the Special Master's view that the provisions of §6 of the Project Act regarding "present perfected rights" operate to preserve intrabasin rights of users within the Lower Basin states to the use of water in the main stream of the Colorado River (Rep. 234-35, 306 *et seq.*). The Special Master has found, and we agree, that the Compact "governs inter-basin relations exclusively" (Rep. 141). The Master further held that "Articles I and VIII [of the Compact] contemplate inter-basin and not interstate operation of the Compact" (Rep. 141). It is our view that §6 of the Project Act does not recognize or confirm any rights within the Lower Basin at all. Section 6 merely directs that the facilities authorized by §1 shall satisfy the requirements of Article VIII of the Compact—that claims of rights by appropriators and users in the Lower Basin against appropriators and

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[21] The Special Master held that the Compact became effective only upon congressional consent thereto, which was given in the Project Act, and that the Act by its terms was to become effective only when the conditions of §4(a) were satisfied and the President so proclaimed. The presidential proclamation was issued on June 25, 1929 (Rep. 152 note 20).

users in the Upper Basin shall attach to and be satisfied from water stored in the Lower Basin. The only portion of Article VIII of the Compact which provides for "satisfaction" of present perfected rights is the second sentence of the first paragraph and this provision is clearly limited to the satisfaction of perfected rights basin versus basin.

An analysis of the circumstances and conditions which existed when the Compact was negotiated strongly supports this conclusion with respect to the meaning of §6.

Prior to this Court's decision in *Wyoming* v. *Colorado*, 259 U.S. 419 (1922), in an interstate stream controversy between two states, both of which applied the doctrine of prior appropriation, it was uncertain whether claims of prior appropriators in one state would prevail against junior appropriators in the other state. While the Compact Commissioners were in negotiation, that decision was rendered, holding that in such a case principles of prior appropriation are controlling.

The decision increased the concern of the Upper Basin that construction of storage facilities on the main stream would permit a rapid expansion of irrigation and other uses in the Lower Basin and form the basis for claims of appropriative rights in the water, which would preclude its availability for the more slowly developing needs of the Upper Basin (Rep. 22, 139-41).

At the same time the predicament in which the Lower Basin users might be placed if the Compact became effective before storage was made available was apparent. Since the Compact, in the absence of the protection afforded the Lower Basin by the first sentence of Article VIII, would effectively preclude the assertion of rights under priorities claimed by the Lower Basin, it would bar recourse to the

courts to require the release of water in times of shortage. Therefore, until storage was provided "within or for the benefit of the Lower Basin", the Lower Basin could not afford to relinquish its right to demand release of water by the Upper Basin in satisfaction of claimed prior rights. Accordingly, the phrase in Article VIII, "present perfected rights . . . are unimpaired", was inserted in the Compact so that Lower Basin users might assert as against Upper Basin users their legal right to demand the release of water in satisfaction of their prior claims until such time as storage facilities were provided, thereby assuring users in the Lower Basin a dependable water supply.

This clearly appears from the provision which immediately follows the first sentence of Article VIII:

> "Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights [*i.e.*, present perfected rights], if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III."

Thus by the device of preserving perfected rights *basin versus basin* until storage was available, protection was afforded main stream Lower Basin users. After storage was provided as contemplated by Article VIII of the Compact, the first sentence of Article VIII had served its purpose and had no further effect.

The Upper Basin, on the other hand, required assurance that the Lower Basin, once storage should become available to it, would not claim rights in excess of the guarantee of

supply found in Article III of the Compact. Accordingly, Article VIII required that water should be stored "not in conflict with Article III" and that all claimed prior rights in the Lower Basin should be, in effect, discharged and released as against the Upper Basin whenever suitable storage facilities were provided "on the main Colorado River within or for the benefit of the Lower Basin."

But even if the first sentence of Article VIII of the Compact may properly be construed as a general guarantee that the Compact would not operate to affect prior perfected rights, it does not follow that §6 of the Project Act was intended to have that effect. It will be observed that §6 of the Project Act does not provide, as does the first sentence of Article VIII, that "present perfected rights . . . are unimpaired". To the contrary, Congress expressly rejected a proposed provision designed to protect appropriative rights (pp. 42-43, *supra*) and §6 says nothing about either impairing or preserving perfected rights. It speaks in terms of "satisfaction" of such rights as contemplated by Article VIII of the Compact. Since this provision of the Compact regarding satisfaction of perfected rights is limited to rights basin versus basin and does not apply to intrabasin rights (Rep. 141), it may not properly be inferred that §6 goes beyond the scope of this provision of Article VIII and operates to preserve perfected rights within the Lower Basin.

Instead of preserving appropriative rights of main stream users, the Compact contemplated that those rights, if any, would be extinguished once storage was provided "within or for the benefit of the Lower Basin". This conclusion follows logically when the Compact scheme for supplying main stream water to Lower Basin users is con-

sidered in connection with the essential nature of an appropriative water right.

Since an appropriative right is fixed and measured in relationship to the supply available from the natural flow of the stream, once the natural flow is destroyed no standard survives by which to determine the users who may take or how much each may divert. An appropriative right does not entitle the user to a full supply of water for a given acreage and may be fully satisfied only if there is enough water in the river "as it was wont to flow" when the right was acquired (pp. 41-42, *supra*). The natural flow of the river, which might be available to junior users for a portion of the year, may not be impounded so as to reserve for senior users a year-round water supply. The holder of a senior right to the natural flow has no greater claim to stored water than does a junior appropriator, since the right of the senior user is not to stored water but only to the natural flow.

The right given the Upper Basin in Article III(d) of the Compact to discharge its water delivery obligation to the Lower Basin without regard to the natural flow of the river clearly demonstrates that the intended preservation of priority of right was not to continue after storage was provided for users in the lower Basin.

The entire approach of the Compact to the problem of allocation between the two Basins of the available water supply rising in the Upper Basin is at variance with a recognition of appropriative rights within the Lower Basin. The fact that the Upper Basin in its sole discretion might vary the supply from year to year, so long as in each consecutive ten-year period the aggregate obligation of Article III(d) was fully discharged, cuts squarely across the theory of a preservation and satisfaction of rights in

natural flow. That this is true is demonstrated by the fact that the storage contemplated in Article VIII would destroy all possibility of measuring and determining the amount of water which a holder of a claimed prior right might be entitled to require at any given time.

The conclusion, therefore, is clear that users in the Lower Basin surrendered their claimed prior appropriative rights in the natural flow of the river (which was silt-laden, given to violent floods and prone to seasonal fluctuations in supply) in exchange for rights to receive from storage a guaranteed average supply of desilted water from a flood-controlled river.

The Special Master, although refusing to accept our construction of §6 and Article VIII, has concluded that a water right is a "present perfected right" within the protection of §6, if it was acquired in compliance with the formalities of state law, but only to the extent that it represented an actual diversion and beneficial use of a specific quantity of water applied to a definite area of land or to a particular domestic or industrial use (Rep. 308).[22] With this definition of "perfected right" we agree.

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[22] The water rights of federal establishments in the Lower Basin have been exempted by the Special Master from compliance with the formalities of state law as a basis for their acceptance, since he holds that the United States has the power to reserve water for the future needs of these establishments independently of state law and even though there has been no actual diversion or beneficial use of any specific quantity of water. To the contrary, the Special Master holds these rights are superior to subsequent appropriations under state law, although the subsequent appropriator may divert and use the water prior to any diversion and use in a federal establishment. Accordingly, a reservation of water by the United States before June 25, 1929 is accorded the protection given by §6, even though, as of that date, the right was not acquired under state law and all the water reserved had not been put to beneficial use (Rep. 257-66, 309-10). These conclusions, with which we disagree, are discussed in Part II of this brief.

However, on the premise that "a statute speaks as of its effective date", the Special Master reasons that the phrase, "present perfected rights", as employed in §6 of the Project Act, means rights perfected when the Act became effective on June 25, 1929 (Rep. 152 note 20).

As we have previously pointed out, the effect of Article VIII of the Compact on perfected rights is limited to claims basin versus basin (pp. 47-49, *supra*). But if that Article was intended to provide for the satisfaction of perfected rights intrabasin, analysis of the Project Act and the provisions of the Compact establishes that §6 was intended to relate only to those rights which were perfected on the date when the Compact was signed.

Although generally a statute "speaks as of" its effective date, nevertheless a statute often does "speak with reference to" circumstances, conditions or things existing at a time antecedent to its effective date.[23]

The Project Act contains no general provision for the satisfaction or preservation of all perfected rights, and the direction of Congress found in §6 that there be satisfaction of present perfected rights "in pursuance of Article VIII of said Colorado River compact" clearly requires that only the present perfected rights referred to by that Article of the Compact be discharged and satisfied. Had the Compact, in place of the phrase "present prefected rights", used the expression, "rights perfected on or before the 24th day of November, 1922", there can be no doubt that the effect of §6 would be limited to the satisfaction of rights perfected

[23] For example, state legislation conferring tax exemptions and other benefits upon veterans commonly restricts such benefits to those who were residents of the state prior to a specified date. Ariz. Const., Art. IX, §2; Ariz. Rev. Stat. Ann. §42-271 (1956); Cal. Stat. 1953, c. 1219, §1.

on or before November 24, 1922, even though the Project Act and the Compact did not become effective until December 25, 1929. Hence, in determining what perfected rights were intended to be satisfied, the meaning of the Compact phrase, "present perfected rights", must be ascertained.

In *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938), the Court dealt with the power of a state to enter into a compact regarding the water of interstate streams. It is clear from that decision that there is no compulsion on compacting states to honor, preserve or satisfy so-called vested rights to the use of water of interstate streams, even though such "rights" have been adjudicated by state courts prior to the compact and are binding upon a state and its citizens. As between states, such rights are not binding, and an apportionment of water by interstate compact may be validly made in disregard of these rights. The states negotiating the Colorado River Compact were under no legal obligation to make any provision in the Compact insuring the preservation or satisfaction of rights to the use of water of the Colorado River which might exist either at the time the Compact was negotiated or at the time the Compact was ratified and approved. The extent to which provision was made in the Compact for satisfaction of such rights must be determined by an interpretation of the language employed in the Compact, viewed in the light of surrounding circumstances and the objectives intended to be accomplished by the Compact.

It will be observed that Article VIII of the Compact carefully specifies "*present*" perfected rights. The natural and unstrained meaning of this term is that it was intended

to cover only those rights existing at the date the Compact was signed. It must have been apparent that a compact, which sought to compose problems as important and controversial as those dealt with by the Compact Commissioners and which were not resolved by them until after protracted negotiations extending over a period of almost a year, would not receive speedy approval by the legislatures of the Colorado River Basin states and the Congress of the United States. Had it been intended that the Compact, in providing for the satisfaction of present perfected rights, should cover rights which were perfected after the signing of the Compact but before its approval and ratification by the United States and the Colorado River Basin states, language clearly expressing that intent would have been employed.

One of the difficulties with which the Compact negotiators had to deal was the claim of prior vested rights. This problem was prominent among those which caused the Compact negotiators to abandon an effort to reach a division of water among the states and to content themselves with an apportionment between the basins, leaving the more difficult problem of division among the states of the two basins for future negotiation and settlement. Under these circumstances, it seems most unlikely that the Compact negotiators would have done more than make provision for the preservation or satisfaction of rights then perfected. It is not reasonable to assume that they intended to add to the difficulties of a problem which they had been unable to resolve, by providing in the Compact for the recognition of additional rights not then in existence.

G. Summary

To summarize: In enacting the Project Act Congress exercised the power conferred upon it by the Commerce Clause over the waters of the Colorado River as a navigable stream of the United States. The construction of Hoover Dam and the creation of Lake Mead, as authorized by Congress, caused all water in the main stream of the river at the site of the dam and reservoir to be impounded and stored in Lake Mead.

Congress also provided for the apportionment among Arizona, California and Nevada of the water thus impounded and stored. Such apportionment renders irrelevant and inoperative the principles and considerations which are material in a case involving the equitable apportionment of water between states.

The Project Act, properly construed, neither recognizes nor preserves any appropriative or "present perfected rights" *intrabasin*. It provides for the satisfaction and discharge of such rights only *basin versus basin*.

If, however, it should be held that any intrabasin rights were preserved by §6 of the Project Act, such protection is afforded only to a right which was perfected under state law as of November 24, 1922, and then only to the extent that it represented an actual diversion and beneficial use of a specific quantity of water applied to a definite area of land or to a particular domestic or industrial use.

The meaning, extent and effect of the statutory apportionment remain to be considered.

II

The Project Act provides for the storage of main stream water only and for its allocation among Arizona, California and Nevada.

The Project Act was not to take effect until certain conditions precedent set forth in §4(a) were met (p. 16, *supra*). Among these conditions was the requirement that California should agree irrevocably and unconditionally:

> ". . . that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

In addition, §4(a) authorized Arizona, California and Nevada to enter into an agreement which should provide, among other things:

> ". . . (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive

beneficial consumptive use of the Gila River and its tributaries within the boundaries of said state. . . ."

The principal contention upon which California rests her case, namely, that §4(a) deals with both main stream and tributary water, was rejected by the Special Master (Rep. 177-79). We agree with his conclusion that the foregoing provisions deal with main stream water only—that the words of §4(a) and the substantially identical language of the California Limitation Act (Appendix C, pp. 27a-28a), *viz.*, "waters apportioned to the lower basin states by paragraph 'a' of article three of the said Colorado River compact" and "excess or surplus waters unapportioned by said compact", refer to "the water stored in Lake Mead and flowing in the mainstream below Hoover Dam" (Rep. 173).

The Special Master's conclusion is supported by other provisions of the Project Act, the general operative plan which they establish and the legislative history of the statute.

1. Interpretation of the phrase, "waters apportioned to the lower basin states by paragraph (a) of Article III" (Project Act §4(a))

A. Provisions and Purposes of the Project Act

One of the stated purposes of the Project Act is "regulating the flow of the Colorado River"—not the Colorado River *System*. Another stated purpose is to provide "for storage and for the delivery of the stored waters thereof", *i.e.*, of "the Colorado River" (§1, Appendix B, p. 9a).

To achieve these purposes, among others, the Secretary of the Interior was "authorized to construct, operate, and maintain a dam and incidental works *in the main stream of the Colorado River* at Black Canyon or Boulder Canyon

adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water. . . ." (§1)

Pursuant to the authority thus conferred, Hoover Dam —"the principal structure in the Lower Basin, impounding the waters of the Colorado River to form Lake Mead"— was erected "in Black Canyon on the main channel of the Colorado River" (Rep. 32). And, as the Special Master stated, "Congress realized that the dam authorized by the Project Act would impound substantially all the water of the mainstream. . . ." (Rep. 153)

The Limitation Act requirement of §4(a) restricts California to "the aggregate annual consumptive use (diversions less returns to the river) *of water of and from the Colorado River*"—not the Colorado River System—clearly a reference to main stream water.

Section 5 (Appendix B, pp. 14a-15a) authorizes the Secretary of the Interior "to contract for the storage of water in said reservoir and for the delivery thereof. . . ." The storage referred to is that provided for in §1, *i.e.*, storage of water "in the main stream of the Colorado River"—not the Colorado River System.

Section 6 (Appendix B, pp. 18a-19a) sets forth the purposes for which the "dam and reservoir provided for by section 1 . . . shall be used"; and §1, as we have said, provides that the dam and reservoir authorized by the Act shall be "for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River" —the main stream.

The water allocation among the Lower Basin states authorized by §4(a) of the Project Act also demonstrates the intent of Congress to deal with main stream water only. Thus, as the Special Master held:

> "Section 4(a) contemplates the division of the water referred to therein only among the three states

> of the Lower Basin which have geographic access to water flowing in the mainstream of the Colorado River, namely, Arizona, California and Nevada." (Rep. 170)

And as the Master stated:

> "Certainly Congress intended that the water, to a portion of which California was limited by Section 4(a), would be mainstream water only. The very language of the Section—it refers to the Colorado River and not to the System—points in this direction. But more important, the second paragraph of Section 4(a) demonstrates that Congress considered the limitation on California to be part of an overall allocation of the entire quantity of water dealt with in that Section among three states only: of the first 7.5 million acre-feet—4.4 to California, 2.8 to Arizona, and .3 to Nevada; the balance to California and Arizona equally." (Rep. 174)

Thus the division of water provided for in §4(a) disposed entirely of the 7,500,000 acre-feet, which are referred to as waters apportioned to the Lower Basin by Article III(a) of the Compact. This disposition, as the Master noted, makes no provision whatever for any apportionment to Utah or New Mexico, and it limits Nevada to 300,000 acre-feet annually (Rep. 175-76). Among the leading proponents of the §4(a) apportionment were the senators from Nevada (Pittman), Utah (King) and New Mexico (Bratton). Had the senators from Utah and New Mexico believed that the proposed §4(a) was intended to recommend a division of water among Arizona, California and Nevada which included water of Lower Basin tributaries in Utah and New Mexico, it is inconceivable that they would not have vigorously opposed these provisions instead of sponsoring and strongly advocating their adoption. It is

also most unlikely that, had Senator Pittman (Nevada) construed §4(a) as involving the water of tributaries, he would have remained silent on the subject or have taken so prominent a part, as he did, in the formulation and advocacy of §4(a).

These circumstances caused the Special Master to conclude that a construction of §4(a) as apportioning water of tributaries as well as of the main stream would require that he "attribute to Congress an intent to deprive two of the states having Lower Basin interests of any participation in the Lower Basin apportionment" (Rep. 175).

The fact that Congress proposed an apportionment among *three* rather than *five* states having Lower Basin interests, and only among those three states which geographically have access to water of the main stream, in the Master's words, "strongly indicates that the congressional intention was to provide only for the apportionment of mainstream water" (Rep. 176).

B. Legislative History of §4(a)

The historical background and legislative history of §4(a) also show that Congress intended by the enactment of the section to deal with main stream water only—that Congress construed Article III(a) of the Compact as apportioning only main stream water to the Lower Basin or at any rate employed its references to Article III(a) to signify water of the main stream only.

A brief review of the circumstances following the negotiation of the Compact and prior to the enactment of the Project Act will demonstrate this.

After the Compact had been signed, it was approved by all the states of the Colorado River Basin, except Arizona (Rep. 24-25). Between 1922 and 1927, California's representatives in Congress introduced measures which would

have authorized construction of a dam at Boulder Canyon and an All-American Canal, all of which failed of enactment (Rep. 27).[24] During the years 1925 through 1927, negotiations between Arizona, California and Nevada looking toward a compact dividing the water apportioned to the Lower Basin by the Compact were unsuccessful.[25]

In 1927 the Governors of the seven Colorado River Basin states convened in an effort to bring about seven-state ratification of the Compact. The Governors of the states of the Upper Division adopted a resolution recommending that, "of the average annual delivery of water to be provided by the States of the upper division at Lees [*sic*] Ferry, under the terms of the Colorado River compact", there be apportioned to Nevada 300,000 acre-feet, to Arizona 3,000,000 acre-feet and to California 4,200,000 acre-feet.[26]

Clearly, this suggested apportionment was of water in the main stream of the Colorado River, since the water referred to was that required by the Compact to be delivered annually "at Lees Ferry"—described by the Compact as "a point in the main stream of the Colorado River one mile below the mouth of the Paria River" (Art. II(e), Appendix A, p. 2a). It is also plain that the water referred to was that apportioned by Article III(a) of the Compact, for the total quantity dealt with by the Governors aggregated 7,500,000 acre-feet per annum, exactly the same quan-

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[24] H. R. 11449, 67th Cong., 2d Sess. (1922); H. R. 2903 and S. 727, 68th Cong., 1st Sess. (1923); H. R. 6251, 69th Cong., 1st Sess. (1925); H. R. 9826 and S. 3331, 69th Cong., 1st Sess. (1926).

[25] 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. 21-23; 70 Cong. Rec. 171 (1928), Ariz. Legis. Hist. 50-57; 70 Cong. Rec. 333 (1928), Ariz. Legis. Hist. 71-72.

[26] 70 Cong. Rec. 172 (1928), Ariz. Legis. Hist. 51-52.

tity which was apportioned to the Lower Basin by Article III(a).[27]

This fact is further evidenced by the distinction drawn by the Governors between the water thus divided and "water to be supplied from the tributaries of the Colorado River flowing in" Arizona and "waters of the tributaries of the Colorado River emptying into the river below Lees Ferry", of which a separate and different disposition was recommended.[28]

Congress was well aware of the resolution adopted at the Governors' Conference, and in fact the division of water among the Lower Basin states recommended by the Governors of the Upper Division states was the starting point for the compromise finally worked out in the Senate and incorporated in §4(a) of the Project Act.

When the fourth Swing-Johnson bill was considered by the Senate the Governors' proposals had not been accepted, primarily because of California's demand that it should have 4,600,000 acre-feet of the water of the Colorado River and Arizona's insistence that California should be limited to 4,200,000 acre-feet.[29]

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[27] The Governors were contemporaries of the negotiators of the Compact. Indeed, Governor Emerson of Wyoming, who voted for the resolution passed at the Governors' Conference, had been the Compact Commissioner for Wyoming.

[28] It was suggested that there be apportioned to Arizona 1,000,000 acre-feet of water from tributaries flowing in Arizona, to be diverted from the tributaries before they empty into the main stream; and it was proposed further that each of the Lower Basin states should have the exclusive use of all water of tributaries within the boundaries of the state which empty into the Colorado below Lee Ferry, before those waters empty into the main stream. 70 Cong. Rec. 172 (1928), Ariz. Legis. Hist. 53.

[29] 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. 22-23; 70 Cong. Rec. 171, 172 (1928), Ariz. Legis. Hist. 50-57.

Such was the Arizona-California controversy over water and the impasse to its settlement when in 1928 Congress took up for consideration and debate the fourth Swing-Johnson bill, which was ultimately to be enacted as the Project Act.

The Arizona-California controversy and the recommendations of the Governors' Conference for its settlement were considered at length by the Senate in the debate on the fourth Swing-Johnson bill. Senator Pittman, who had attended the Conference, gave the Senate a summary of its proceedings, including the proposals made for division among the three Lower Basin states of the water to be delivered by the Upper Basin at Lee Ferry. He explained that in dividing this water the Governors had dealt with the 7,500,000 acre-feet apportioned to the Lower Basin by Article III(a) of the Compact. He then quoted the language of Article III(a) and concluded:

> "In other words, those State governors believed that there was only 7,500,000 acre-feet of water to divide, and they proposed to divide it, as I have said, 4,200,000 acre-feet to California, 3,000,000 acre-feet to Arizona, and 300,000 acre-feet to Nevada.
>
> "California said 'We can not possibly do with that amount of water; we must have 4,600,000 acre-feet instead of 4,200,000 acre-feet.' Arizona would not yield more . . . ."[80]

The Senate fully recognized the pressing necessity for a settlement of the Arizona-California controversy and Senators expressed regret that a difference of 400,000 acre-feet of water was preventing its solution.

The Senate finally split the difference by providing in §4(a) of the Project Act for the apportionment of Article

[80] 69 Cong. Rec. 10259 (1928), Ariz. Legis. Hist. 23.

III(a) water as follows: not to exceed 4,400,000 acre-feet to California, 300,000 acre-feet to Nevada and 2,800,000 acre-feet to Arizona.[31]

In arriving at this compromise the Senate unquestionably was dealing with water in the main stream of the Colorado River. The division was patterned upon the apportionment suggested by the Governors' Conference, which was an apportionment of main stream water.

For example, Senator Hayden, referring to the Governors' Conference, reported that the conferees had suggested the following division of water:

> "1. Of the average annual delivery of water to be provided by the States of the upper division at Lees [*sic*] Ferry under the terms of the Colorado River compact:
>
> (a) To the State of Nevada 300,000 acre-feet.
>
> (b) To the State of Arizona, 3,000,000 acre-feet.
>
> (c) To the State of California, 4,200,000 acre-feet."[32]

Senator Pittman further stated:

> "Arizona, as I understand, will ratify the agreement whenever there shall be a provision in the bill or a separate agreement between Nevada and Arizona and California dividing the water *let down to the three lower States.* Of the 7,500,000 acre-feet of *water let down that river* they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together."[33]

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[31] 70 Cong. Rec. 164, 232, 333, 385, 386 (1928), Ariz. Legis. Hist. 29-30, 67, 71, 88-89, 94-97.

[32] 70 Cong. Rec. 172 (1928), Ariz. Legis. Hist. 51.

[33] 70 Cong. Rec. 232 (1928), Ariz. Legis. Hist. 67.

Senator Pittman, in depicting the situation which might arise in the absence of a compromise, stated:

> "In other words, there are only 15,000,000 acre-feet *in the river*. Seven million five hundred thousand are forever to be retained in the upper States, to be put in use some time in the future.
>
> "Now, unless there was an agreement as to exactly how much water should go to the lower States *out of the 7,500,000 acre-feet that went down to them*, what might be the result? If Arizona stays out of the agreement, she would have her legal right to appropriate as much water as she could put to beneficial use. On the other hand, California would only be restricted by the *7,500,000 acre-feet that went down*, with the result that there would be nothing in the compact to prevent California from using the entire 7,500,000 acre-feet and there would be nothing in the compact to prevent Arizona from using the 7,500,000 acre-feet if she never went into the compact."[34]

Finally, Senator Pittman, in discussing the Hayden amendment to §4(a), which eliminated the Gila River from the terms of any Mexican Treaty, stated:

> "As I understand this amendment, Arizona to-day has practically allocated to it *2,800,000 acre-feet of water in the main Colorado River*. It is there for their use. As I understand it, they are willing to give up any amount that may be necessary to meet the demands of Mexico from that 2,800,000 acre-feet, provided it is matched by an equal amount of water out of California's allocation of 4,400,000 acre-feet."[35]

These repeated references in the congressional debate on §4(a) to "water let down to the three lower States", to

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[34] 70 Cong. Rec. 386 (1928), Ariz. Legis. Hist. 93.

[35] 70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. 126.

"water let down the river", to "the 7,500,000 acre-feet that went down to them" and to Arizona's share as "2,800,000 acre-feet of water in the main Colorado River", referred and could only have referred to water in the main stream. They compel the conclusion reached by the Special Master that:

> "It is clear that Congress intended Section 4(a) of the Project Act to apply only to the mainstream . . . ." (Rep. 173)

C. The Water Dealt With By Article III(a) of the Compact

We agree with the Special Master's conclusion that, since the Compact made no division of water among the Lower Basin states, it is not relevant to the allocation among Arizona, California and Nevada of water from Lake Mead and from the main stream of the river below Hoover Dam (Rep. 138-41). However, against the eventuality that the Court may differ with this conclusion, the Report sets forth the Master's interpretation of the Compact. It is only against this same eventuality that Arizona has noted, by her exceptions to the Report, disagreement with the Master's understanding of the Compact (A Exc. 1, 2).

(1) The congressional interpretation of Article III(a) of the Compact is controlling.

The Master construes the Compact as a separate and independent document wholly apart from and without reference to the Project Act (Rep. 138-51). In this we believe he is in error. The Compact cannot be properly construed apart from the Project Act, since it was not to become "binding and obligatory" until approved by the Congress of the United States (Compact Art. XI, Appendix A, p. 7a).

Further, since the consent of Congress is a condition precedent to the effectiveness of an interstate compact

(U. S. Const. art. I, §10), the interpretation given such a compact by Congress in consenting to it is controlling, for otherwise there would be no true congressional consent. Therefore, it is the congressional construction of the Compact embodied in the Project Act and subsequently accepted by the states, which is controlling and conclusive.

The meaning which Congress ascribed to the Compact in enacting the Project Act is clearly manifested by the legislative history of the statute. California had pressed for enactment of the predecessor Swing-Johnson bills through three Congresses and had been opposed not only by Arizona, but by the Upper Basin states as well. Had California advanced during the Senate debates her present interpretation of Article III(a) of the Compact and the references to it in the Limitation Act (see Rep. 177-78; p. 58, *supra*), there is little doubt that the Project Act would not have been passed, at least until and unless California had receded from her position. This is made clear by the following facts.

The Upper Basin states were vitally concerned lest, without Arizona's ratification of the Compact, California would put to use large quantities of main stream water and Arizona, free from any Compact restrictions and having large areas of irrigable land, would develop this land before the Upper Basin states could develop theirs. The Upper Basin feared that Arizona would claim prior rights to water for her land and that consequently the obligation of the Upper Basin to release water for use in the Lower Basin would be enlarged above the Compact apportionment.

The Upper Basin understood that its obligation to deliver water to the Lower Basin arose from and was limited by paragraphs (a) and (d) of Article III of the

Compact. This also was the understanding of Congress. Senator Pittman, discussing the Phipps amendment, stated:

> "Mr. President, I want to say that the amendment of the Senator from Colorado (Mr. Phipps) now offered is substantially recommended by the committee. The bill as originally introduced by the Senator from California (Mr. Johnson) had no reference in it to water at all, but it became evident to the committee that there had to be some reference with regard to water because not only were the States of California and Arizona interested in this larger supply of water but the four upper States were interested as well. This amendment was offered in committee by the Senator from Wyoming (Mr. Kendrick) for the purpose of protecting the water rights of the four upper States. In other words, there are only 15,000,000 acre-feet in the river. Seven million five hundred thousand are forever to be retained in the upper States, to be put in use some time in the future.
>
> "Now unless there was an agreement as to exactly how much water should go to the lower States out of the 7,500,000 acre-feet that went down to them, what might be the result? If Arizona stays out of the agreement, she would have her legal right to appropriate as much water as she could put to beneficial use. On the other hand, California would only be restricted by the 7,500,000 acre-feet that went down, with the result that there would be nothing in the compact to prevent California from using the entire 7,500,000 acre-feet and there would be nothing in the compact to prevent Arizona from using the 7,500,000 acre-feet if she never went into the compact.
>
> "So the upper States said: 'We have got to be assured that there is not used in the lower basin more than the 7,500,000 acre-feet, because, if there is more used, then when we get ready to use it in the future it will not exist under the law of appropria-

tion that applies in that section of the country.' Consequently, in view of the fact that Arizona might never go into the compact, might never be bound by compact, might be perfectly free to exercise her equal right and put to use as much as she could put to beneficial use, it was said in the committee, 'If Arizona does not come in and if it is limited to six States only, then we must be assured that California will not take the full 7,500,000 acre-feet and then Arizona take some more.' So the Senator from Wyoming (Mr. Kendrick) offered an amendment in committee, to which the committee agreed, and that amendment provided that California should never consumptively use of the Colorado River over 4,600,000 acre-feet.

* * * * * *

"Let me now call attention to the fact that the committee adopted the Kendrick amendment. They adopted the amount that California demanded, which was 4,600,000 acre-feet. I voted for that amendment. Why? I voted for it because otherwise Arizona would not participate in the compact and would not participate in the division of water. In other words, it was apparent to me that California was so dissatisfied with it that we had to treat without Arizona. We treated without Arizona in the committee, and we put the amount in there that California demanded before the four governors at Denver [*sic*].

* * * * * *

"Mind you, this 6-State agreement is only an expedient. It is not what any of the seven States want. All of the seven States want a fair treaty between the seven States, and we have been striving to that end for several years. It looks to me as though we are on the eve of getting an agreement.

* * * * * *

"I think it would be a terrible mistake when everyone has reached the point of compromise as we have

here. If California's allotment is reduced 200,000 acre-feet out of 7,500,000 and Arizona concedes 200,000 acre-feet to California for the purpose of compromise, we should vote for it, because if we do not bitterness is bound to exist between these States. *If we do not, there have got to be a number of other provisions in the bill to satisfy the other States, because there is fear in the four upper States with regard to any kind of a ratification except by all the States.*''[36]

Immediately following this explanation by Senator Pittman and after a brief interchange between Senators Hayden and Johnson, the Senate compromised the dispute by limiting California to 4,400,000 acre-feet of water annually.

It is quite clear, therefore, that Congress intended to limit California to the use of not more than 4,400,000 acre-feet of water per year of the supply which the Compact obligated the Upper Basin to release to the Lower Basin.

It is also clear that Congress equated the Article III(d) delivery obligation, requiring the release by the Upper Basin to the Lower Basin of 75,000,000 acre-feet of water in every ten-year period, with the 7,500,000 acre-feet apportioned to the Lower Basin by Article III(a). Following the adoption of the Bratton amendment to the Phipps amendment limiting California to an annual use of 4,400,000 acre-feet per year ''of the waters apportioned to the lower basin States by the Colorado River compact'', Senator Phipps offered a change in the language of his amendment with this explanation:

''Referring to the amendment which is now before the Senate, in order to remove any possible mis-

[36] 70 Cong. Rec. 386 (1928), Ariz. Legis. Hist. 93-96.

> understanding regarding the 4,400,000 acre-feet of water, I desire to perfect the amendment by inserting, on page 3, line 4, after the word 'by,' the words 'paragraph (a) of article 3 of,' so that it will show that that allocation of water refers directly to the seven and one-half million acre-feet of water that are mentioned in paragraph 3."[37]

Without objection, this modification of the Phipps amendment was permitted.

In reliance upon the foregoing understanding of the Compact, the Upper Basin states supported the Project Act and Congress authorized the expenditure of millions of dollars for construction of Hoover Dam and the All-American Canal, all to the great benefit of California.

The words of Justice Jackson, concurring in *West Virginia ex rel. Dyer* v. *Sims,* 341 U. S. 22, 36 (1951), are applicable:

> "After Congress and sister states had been induced to alter their positions and bind themselves to terms of a covenant, [California] . . . should be estopped from repudiating her act."

(2) The Compact apportioned main stream water.

Even without reference to the congressional interpretation, however, the Compact, properly understood, apportioned only main stream water.

The Master has construed Article III(a) of the Compact as dealing with both the main stream and tributaries of the Colorado River (Rep. 142-51). Having thus interpreted the Compact and having also found that §4(a) of the Project Act deals only with water in the main stream of the river, the Master was obliged to conclude that Congress did not use the phrase, "waters apportioned to the lower basin States by paragraph (a) of Article III of the

[37] 70 Cong. Rec. 459 (1928), Ariz. Legis. Hist. 100.

Colorado River compact", in the same sense as these words were used in the Compact. He considered the congressional reference to Article III(a) solely as "shorthand" for "7,500,000 acre-feet per annum"; and he found that Congress intended, in limiting California to 4.4 million acre-feet of "the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact", simply to limit California's annual use of water to 4.4 out of the first 7.5 million acre-feet of main stream water available to the Lower Basin. Accordingly, he concluded: "I hold that Section 4(a) of the Project Act and the California Limitation Act refer only to the water stored in Lake Mead and flowing in the mainstream below Hoover Dam, despite the fact that Article III(a) of the Compact deals with the Colorado River *System,* which is defined in Article II(a) as including the entire mainstream and the tributaries." (Rep. 173) (Master's italics)

We differ with this reading of the Compact. In our view, Congress correctly understood and accurately employed the clause of the Compact to which reference is made in §4(a), *i.e.*, "waters apportioned . . . by paragraph (a) of Article III of the . . . compact", as covering main stream water only, to the exclusion of water of tributaries. We base our position upon the terms of the Compact, considered in the light of the problems and conditions confronting its negotiators.

The acknowledged fact that the Compact division of water is made only between Upper and Lower Basins (Rep. 138-41), when regarded in the setting of the conditions which created the need for an interbasin agreement, leads to the conclusion that the apportionment made by the Compact to the Lower Basin was of main stream water only.

We have previously described the geography of the Colorado River Basin (pp. 10-11, *supra;* see Rep. 9-14),

which shows clearly that the only water available to both the Upper and Lower Basins and to *which both could lay claim* was water rising in the Upper Basin and descending to the Lower. The Compact was designed to accomplish a settlement of the conflicting claims of each basin to this water.

We have also reviewed the conditions—the climatic, topographical and agricultural differences between the two basins, the contrast between their respective rates of growth and expansion, the need and desire of the Lower Basin for the erection of structures on the river which would insure flood control and a stable water supply to the Lower Basin, the fears of the Upper Basin that expanded use of water in the Lower Basin would give rise to claims of water rights in the Lower Basin prior and superior to those of the Upper Basin—which brought about the appointment of the Compact Commissioners and caused them to compromise and agree upon a division of Colorado River water between the two basins rather than among the Colorado River Basin states (pp. 11, 13, 68, *supra*).

The water which the Commissioners sought to divide was certainly not the water of Lower Basin tributaries. The Upper Basin was not interested in Lower Basin tributaries. Its fears concerned Lower Basin claims to water originating in the Upper Basin. Its guiding purpose was to reserve as much of that water as possible. The water of tributaries in the Lower Basin was of no concern to the Upper Basin for the simple reason that this water was not and could never be physically available for use in the Upper Basin and therefore the Upper Basin could have no claim thereto.

The Upper Basin negotiators had as their main objective an agreement requiring the release of a minimum of water, thereby protecting the Upper Basin during its compara-

tively slow development from claims of extensive prior appropriative rights in the Lower Basin. On the other hand, Lower Basin negotiators had as their primary aim an agreement which would require the release of a maximum of water by the Upper Basin. This dominating purpose to apportion main stream water interbasin and not interstate is reflected and accomplished by the terms of the Compact.

It is true, as the Special Master notes, that Article II(a) of the Compact defines the "Colorado River System" as "that portion of the Colorado River and its tributaries within the United States of America", that Article III(a) apportions "from the Colorado River Sytem . . . the exclusive beneficial consumptive use . . . of water", and that Article III(b) permits the Lower Basin "to increase its beneficial consumptive use of such waters".

The Master concludes from these provisions that Article III(a) and (b) necessarily refer to water *of* the "System" as defined in Article II(a), *i.e.*, to main stream and tributary water (Rep. 142-43). This conclusion, however, disregards the fact that the water apportioned by Article III(a) is not water *of* the System but water *"from"* the System and that Article I of the Compact declares that only "an apportionment of the use of *part* of the water of the Colorado River System" is made. In fact, Article III(f) and (g) make provision for "further equitable apportionment of the . . . waters of the . . . System . . . at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)". Article VI provides for consideration and adjustment of "any claim or controversy . . . between any two or more of the signatory states . . . with respect to the waters *of* the Colorado River System *not covered* by the terms of this Compact".

The Master rejects Arizona's position that the foregoing provisions indicate that only main stream water was apportioned to the Lower Basin by the Compact. He considers Article I to be consistent with Article III(f) and (g), in that the latter provisions simply contemplated a further equitable apportionment "of remaining *System* water" (Rep. 143). But if, as the Master says, "Article VI demonstrates that the Compact governs inter-basin and not interstate relations" (Rep. 143), it is hard to see how "a further equitable apportionment" could include water of Lower Basin tributaries, which was and is physically inaccessible to the Upper Basin.

In this connection, it is to be noted that the Compact divides the Colorado River Basin, as therein defined, into the Upper and Lower Basins and fixes the dividing point between the two at Lee Ferry, Arizona—"a point *in the main stream* of the Colorado River one mile below the mouth of the Paria River" (Art. II(e)).

Not only is Lee Ferry made the dividing point between the two basins, but it is also the point at which the Upper Basin is required to deliver to the Lower Basin water "*from* the Colorado River System". By Article III(d) the states of the Upper Division guarantee that the "flow of the river at Lee Ferry" shall not "be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years".

Similarly, Article III(c) provides that, in the event "surplus" water, as there defined, should prove insufficient to satisfy any rights which may be recognized in Mexico "to the use of any waters of the Colorado River System", the burden of the deficiency shall be borne equally by the Lower and Upper Basins and, whenever necessary, "the

States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency . . . ."

Article V provides that state and federal officials shall cooperate "to secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry". It was important to ascertain annual flow at Lee Ferry because Lee Ferry is the delivery point where water is to be let down to the Lower Basin by the Upper Basin in discharging its obligations under the Compact. If water of Lower Basin tributaries had been included in the apportionment, provision for its measurement would have been made.

Subdivision (e) of Article III provides that the states of the Upper Division "shall not withhold water" and the states of the Lower Division "shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses." These terms necessarily refer to main stream water at Lee Ferry, because it is physically impossible for the Upper Division to "withhold" water of Lower Basin tributaries—water over which the Upper Division has no control. Conversely, to have required the Upper Division to deliver at Lee Ferry water of Lower Basin tributaries would have imposed an obligation impossible of performance.

The Colorado River Commissioners, in deliberately selecting Lee Ferry as the dividing point between the two Basins and as the delivery point of water to be let down from the Upper to the Lower Basin, recognized the fact that Lower Basin tributary water was not available for the interbasin apportionment made by Article III of the Compact.

The Master apparently overlooked the significance of Lee Ferry as the dividing point between the two Basins and as the delivery point of the water to be let down by

the Upper Basin. At least, he does not discuss the subject in his Report.

The Master also rejects Arizona's claim that Article III(a) and III(d) are correlative and therefore that Article III(a) relates to the main stream. Despite the fact that the 75,000,000 acre-feet referred to in III(d) is exactly ten times the 7,500,000 acre-feet referred to in III(a), the Master considers this a mere "coincidence" and sees no correlation between the two (Rep. 188).

Article III(d) provides that the "States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification" of the Compact.

In our view, there is a clear and indeed necessary correlation between the "aggregate of 75,000,000 acre-feet" over a ten-year period, which is referred to in III(d), and the "7,500,000 acre-feet of water per annum", which is apportioned to the Lower Basin by III(a). Not only is this correlation suggested by the mathematics of multiplying 7,500,000 by ten, but it becomes even clearer when the purposes of the two clauses are considered.

Article III(d) requires the Upper Basin to let down to the Lower Basin an average of 7,500,000 acre-feet of water per annum. This is made a firm unconditional obligation on the Upper Basin—one which it must meet even though it may conceivably result in insufficient water to supply in full the quantity of water apportioned to the Upper Basin by Article III(a). One of two objectives may be ascribed to this required delivery of water: first, for use in the Lower Basin; second, for use in Mexico. The purpose could not

have been for use in Mexico, because any rights of Mexico are to be satisfied in accordance with the provisions of Article III(c), and the responsibility of the Upper Basin to deliver water for the Mexican Treaty obligation is "in addition to that provided in paragraph (d)". Therefore, the only purpose which can reasonably be ascribed to the requirement for the delivery of water imposed by subparagraph (d) is to guarantee to the Lower Basin a supply of water to meet the apportionment made to it by Article III(a) of the Compact (A Exc. 4).

Article III(d) was incorporated into the Compact to insure the Lower Basin that the apportionment made to it by Article III(a) would be satisfied out of main stream water originating in the Upper Basin and to assure that this apportionment would be met even during those periods when the water supply rising in the Upper Basin was insufficient to fulfill the total apportionment made to both basins by Article III(a).

In finding this position unacceptable, the Master held:

> "Since Article III(a) imposes a limit upon appropriation whereas III(d) deals with supply at Lee Ferry, an interpretation which makes these two provisions correlative one to another is inadmissible. . . . Moreover, III(a) extends to appropriations on Lower Basin tributaries as well as the mainstream. Such appropriations cannot possibly have any relation to the quantative measurement of the flow of water at Lee Ferry." (Rep. 144)

We respectfully suggest that two fallacies underly these conclusions: (1) that Article III(a) imposes a limit on appropriations and (2) that the limit extends to appropriations on Lower Basin tributaries as well as to appropriations on the main stream.

As we have seen, Article III(a) apportions main stream water only, not the water of tributaries. In holding that Article III(a) and (b) make an apportionment "by establishing a ceiling on the quantity of water which may be appropriated in each Basin as against the other" (Rep. 140) (footnote omitted), the Master is clearly in error. The Master's construction would attribute to the Upper Basin an intent to place a ceiling on economic development on the tributaries throughout the Lower Basin—obviously a matter of no concern to the Upper Basin. The Compact itself speaks of apportionment of water and not in terms of limitation on appropriation (see, *e.g.*, Articles I, III(a), (b), (f), (g), VIII).

We believe that Article III(a) makes an apportionment of water in perpetuity to each basin, regardless of the extent of appropriations in either basin of the water so apportioned. In fact, the concern of the Upper Basin was that the acquisition of prior appropriative rights in the Lower Basin might entitle Lower Basin users to enforce their prior claims against the Upper Basin. As a result, Article VIII of the Compact provides that the right to enforce Lower Basin appropriative rights against Upper Basin users shall cease when storage facilities on the main Colorado River have been provided in or for the benefit of the Lower Basin. By making an apportionment of water in perpetuity to each basin, the Compact insures that the future development of the Upper Basin shall be protected without interfering with the increased use of water in the Lower Basin and that each basin shall be left free to expand in an orderly manner without engaging in a race with the other.

It is Arizona's position that the terms of the Compact, when considered in relation to the conflict between the two

basins, the purposes which the framers sought to achieve and the geographical and physical facts confronting them, lead directly to the conclusion that Article III(a) apportions to the Lower Basin in perpetuity 7,500,000 acre-feet of water per annum from the main stream of the Colorado River at Lee Ferry and that tributary water is not included in this apportionment.

2. Interpretation of the phrase, "excess or surplus waters unapportioned" by the Compact

A. Article III(b) water is apportioned main stream water in the Compact sense.

Arizona contends, for the same reasons advanced in regard to Article III(a) of the Compact (see pp. 67-80, *supra*), that the 1,000,000 acre-feet of water referred to in Article III(b) is main stream water only. That is to say, both III(a) and (b) deal with the same water—water of the main stream (A Exc. 1, 2).

The Special Master gives Article III(b) of the Compact a construction similar to his interpretation of Article III(a), *i.e.*, as referring to water in the Colorado River *System*, main stream and tributaries (Rep. 194-200).

The Master concurs, however, in Arizona's position that both Article III(a) and (b) make an apportionment and that the water dealt with in III(b) is apportioned water. This, he agrees, is made manifest by Article III(f), which provides for "further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c)" of Article III (Rep. 150).

B. Section 4(a) of the Project Act treats Article III(b) water as "surplus".

Although Article III(b) water is thus "apportioned" for Compact purposes, the Master holds that this fact does not control the interpretation of §4(a) of the Project Act (Rep. 150-51).

In construing the Act, the Master finds that the Article III(b) uses of water are "apportioned" for Compact purposes only and not "apportioned" for purposes of §4(a). Accordingly, he concludes that the phrase "excess or surplus waters unapportioned by said compact", as employed in §4(a), does not exclude the water referred to in Article III(b) of the Compact and includes all water above the first 7.5 million acre-feet available from the main stream in the Lower Basin in the United States in any one year (Rep. 194-200).

Before the Special Master, Arizona argued that Congress properly regarded the water dealt with by Article III(b) as water "apportioned" by the Compact and that, when Congress by §4(a), divided "excess or surplus waters unapportioned by said compact" equally between Arizona and California, it did not intend to include in the surplus "unapportioned" waters the water which had been apportioned by Article III(b); hence that §4(a) of the Project Act excluded California from the consumptive use of Article III(b) water. However, after further reflection, we are persuaded by the Special Master's reasoning that Arizona's original position is untenable (see Rep. 194-200).

Therefore we now concede that the phrase, "excess or surplus waters unapportioned by said compact", as used in §4(a), includes consumptive use of all main stream water above the first 7.5 million acre-feet available for use by the Lower Basin states in any one year.

III

The Project Act established a formula which governs the apportionment of main stream water among Arizona, California and Nevada and to which the water delivery contracts made by the Secretary of the Interior are required to conform.

A. The Formula Established by §4(a)

In §4(a) of the Project Act, as we have seen, Congress authorized what it considered to be a fair and equitable apportionment of main stream water among the Lower Basin states. On that basis, it undertook a settlement of the long-standing Arizona-California dispute regarding the division of main stream water available in the Lower Basin.

By §4(a), Congress made an overall allocation of the entire quantity of main stream water dealt with therein by establishing a formula under which the first 7.5 million acre-feet of that water should be divided in an amount not to exceed 4.4 to California, 2.8 to Arizona and .3 to Nevada and the surplus above 7.5 million to California and Arizona equally (Rep. 174).

In addition to requiring California to limit its claims, §4(a) gave the states of the Lower Basin advance congressional approval of an interstate compact which would adopt the apportionment of water thus authorized. But the Project Act did more. Section 4(a) established a formula for the division of water among the Lower Basin states which, by virtue of §5 (Appendix B, pp. 14a-15a), the Secretary of the Interior was required to follow in contracting for delivery of water from Lake Mead for use within those states, unless a different division of the water should be agreed upon by compact between the states as provided by §8(b)

(Appendix B, p. 20a). Although no interstate compact such as that contemplated by the Act was ever made, the apportionment of water approved by Congress in §4(a) nevertheless became an effective statutory apportionment by operation of §5.

B. The Requirement of §5 That Water Delivery Contracts Conform to the Formula

Section 5 provides in part that:

> "No person shall have or be entitled to have the use for any purpose of the water stored . . . [in Lake Mead] except by contract made as herein stated."

Also:

> "That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses . . . ."

Further:

> "Contracts respecting water for irrigation and domestic uses shall be for permanent service and *shall conform to paragraph (a) of section 4 of this Act*. . . ."

In thus requiring that water delivery contracts conform to §4(a), Congress prescribed specific standards which the Secretary was to follow—the formula for the apportionment of water approved by Congress in §4(a).

This conclusion is supported further by the following provisions of §8(b):

> "(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and

> other works herein authorized, including the appropriation, delivery and use of water . . . shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.*"

By virtue of these provisions the states of the Lower Basin were left free to adopt, subject to congressional approval, a different apportionment if the formula set forth in §4(a) was not satisfactory to them. However, any such compact entered into and approved by Congress after January 1, 1929 was to be subject to all prior water contracts made by the Secretary of the Interior under §5 of the Act (Rep. 151).

Congress, therefore, must be held to have anticipated that there might be delay in the consummation of such a compact. Equally, Congress must have anticipated that there might be delay in the acceptance of the compact approved in advance by Congress in §4(a). Significantly, Congress made no provision in §4(a), similar to that found in §8(b), to preserve rights accruing under contracts

with the Secretary entered into prior to the making of the interstate compact authorized and approved by §4(a). The only reasonable explanation for this omission is that Congress had specified by §5 that the Secretary's contracts must conform to the allocation of §4(a) and that the Secretary was therefore without authority to deviate from the apportionment approved by §4(a). Thus there could be no conflict between the Secretary's contracts and that apportionment and hence no occasion to make provision governing rights in the event of such a conflict.

Since the Lower Basin states have not entered into any interstate compact as contemplated by §8(b), all contracts of the Secretary for delivery of water from Lake Mead must conform to paragraph (a) of §4—*i.e.*, must comply with the formula for the division of water prescribed by §4(a).

The Special Master, on the basis of an analysis of §§1, 5, 6 and 8 of the Project Act and a review of the purposes and legislative history of the Act, reached the conclusion that it was designed to establish the authority for the Secretary of the Interior to make an allocation by his water delivery contracts of all available water in Lake Mead and in the main stream downstream from Lake Mead among Arizona, California and Nevada (Rep. 151-64).

He found that §§4(a) and 8(b) of the Project Act authorized a division of water among the interested states by an interstate compact, but that in the absence of such an agreement "Congress clearly intended that the limitation on California in Section 4(a) and the Secretary's water delivery contracts made pursuant to Section 5 would impose a federal apportionment on the states" (Rep. 154).

This "federal apportionment" is also referred to in the Report as "a formula for the apportionment of mainstream

water among the three states of the Lower Basin with geographic access to the Colorado River; namely, Arizona, California and Nevada" (Rep. 99) (footnote omitted) and as "a flexible formula authorized by Congress and effectuated by the Secretary of the Interior. . . ." (Rep. 100)

However, the Special Master has refused to accept Arizona's view that the statutory apportionment thus established constitutes a mandatory "formula for the allocation [of water] which the Secretary is required precisely to follow" in making contracts for the delivery of water (A Exc. 7). The Master regards §§4(a) and 5 as requiring "substantial", not precise, compliance by the Secretary with the apportionment approved by Congress and he concludes that those sections give the Secretary "discretion" to make "contracts which apportion the water available in Lake Mead substantially along the lines which Congress proposed in Section 4(a) of the Project Act as a fair and equitable division among Arizona, California and Nevada" (Rep. 162).

In rejecting Arizona's argument that the second paragraph of §4(a) establishes a mandatory apportionment to which the Secretary's contracts must conform, the Master states that this paragraph

> " . . . merely *authorizes* a tri-state compact for the division of water; it does not compel it; nor does it condition approval of the Colorado River Compact upon acceptance of the proposed tri-state compact. . . . The suggested compact which Congress was willing to approve in advance is of no compelling force or effect since no such compact has ever been agreed to. In so far as Section 5 refers to the second paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the states. See also Section 8(b).

Arizona's contention in this respect must therefore be rejected." (Rep. 163) (Master's italics)

We believe this construction of the second paragraph of §4(a) and of §§5 and 8(b) is erroneous (A Exc. 7). So interpreted, these sections would require the Secretary's water delivery contracts to "respect" only the compact, if any, made by the Lower Basin states for the division of water among them. It must follow that, since no such compact exists, there is no standard which the Secretary is required to "respect" or to follow in contracting for the delivery of Lake Mead water. Certainly, this result was not contemplated by Congress. Section 8(b) fixed January 1, 1929 as the deadline for an apportionment of water by a compact between Arizona, California and Nevada, or any two thereof, which, when consented to by Congress, would control all contracts for water delivery made by the Secretary. Section 8(b) also authorized such a compact to be concluded subsequent to January 1, 1929, but that compact was to be "subject to all contracts, if any, made by the Secretary of the Interior under section 5 . . . prior to the date of such approval and consent by Congress". If no compact whatever was made by the Lower Basin states, either pursuant to §§4(a) or 8(b), "Congress clearly intended", as the Master holds, "that the limitation on California in Section 4(a) and the Secretary's water delivery contracts made pursuant to Section 5 would impose a federal apportionment on the states" (Rep. 154).

If §4(a) does not establish a formula governing the Secretary's water contracts, then the authority given him by §5 to make those contracts "under such general regulations as he may prescribe" may well constitute an unconstitutional delegation of legislative functions to an admin-

istrative officer. Regulations made by executive officers are valid only insofar as they are subordinate to a legislative policy adequately defined by statute and when found to be within the framework of the policy so defined. See *Kent* v. *Dulles*, 357 U. S. 116, 129 (1958); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 529, 542 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421-30 (1935) and authorities there reviewed; *Lichter* v. *United States*, 334 U. S. 742, 785 (1948); *Bowles* v. *Willingham*, 321 U. S. 503 (1944); *Yakus* v. *United States*, 321 U. S. 414 (1944).

Section 4(a) expresses the congressional policy for division among the Lower Basin states of the water apportioned to that basin by Article III(a) of the Compact and of the excess or surplus water unapportioned by the Compact. Unless the provisions of §4(a) govern and control the Secretary's water contracts, there is no sufficient frame of legislative policy to which his regulations and the contracts made pursuant thereto can be referred.

Since the Court will not so construe an act of Congress as to render it unconstitutional unless no other construction is reasonably possible, §4(a) should be interpreted as fixing the criteria for the division of water which the Secretary must follow in contracting with Lower Basin states.

The Special Master has found that the Act imposes substantial and sufficient limitations on the Secretary's discretion (Rep. 161). For example, he found that the Secretary may not contract with California for more than 4,400,000 acre-feet out of 7,500,000 acre-feet of main stream water plus not more than one-half the surplus. This does not require the Secretary to contract with California for 4,400,000 acre-feet or for any amount, nor does it provide

standards to guide him in the disposition of water not contracted for with California.

Section 5 contains detailed specifications governing the Secretary's contracts for electrical energy and its generation. In fact, all of §5, except the first two unlettered paragraphs, deals solely with contracts for the sale and delivery of electrical energy. Congress, we submit, would hardly have regulated the Secretary's contracts for allocation of electrical energy in such detail and yet have granted him broad discretionary power with respect to the allocation of water—the subject of a bitter controversy which had prevented ratification of the Compact by Arizona and had blocked passage of the Swing-Johnson bills in three previous Congresses. Moreover, when Congress intended to clothe the Secretary with discretion, it did so in plain terms (see, *e.g.*, §7). It is only reasonable to conclude therefore that Congress considered it had effectively provided in the Project Act for an apportionment of water binding on the Secretary.

The fact that Congress intended to divide main stream water among Arizona, California and Nevada is further established by reference to the legislative history of the Project Act. Throughout the debate in the Senate, the Senators who were primarily interested in finding a solution to the Arizona-California controversy repeatedly referred to the fact that the bill would apportion water among the states and was designed to settle the dispute.

For example, on December 6, 1928, Senator Hayden of Arizona proposed an amendment to §4(a) which would have required California to limit itself to 4,200,000 acre-feet per annum and to agree to a tri-state compact allocating 300,000 acre-feet to Nevada and 3,000,000 acre-feet to

Arizona.[38] This proposal was the subject of a large part of the debate which followed. Senator Hayden, in explaining his amendment, said:

> "The State of Arizona is, therefore, interested in an apportionment of the waters of the lower basin. That is what the amendment which I have offered proposes to do."[39]

Senator Johnson of California also recognized that the Hayden amendment, which formed the basis for §4(a) as enacted, was intended to make an allocation of water among the three states:

> "Mr. Johnson. . . . I did not understand the Senator from Arizona in his speech of yesterday to say that a division of water alone would lead to a composition of the differences which exist. I understood him yesterday to insist not alone upon a division of water, as he suggests now, but, as well, to rest upon a substantial prohibition in this bill of the erection by the United States Government of a generating plant at Boulder Dam. . . .
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> • • • • • •
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> "Mr. Johnson. . . . Let me say, then, to the Senator from New Mexico [Mr. Bratton], that there are two conditions annexed here: First, Arizona says, 'You must divide the water in accordance with what has been suggested.'
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> • • • • • •
>
> "Mr. Bratton. Let us separate the two things for the moment and discuss only the division of water.
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> • • • • • •

[38] 70 Cong. Rec. 162 (1928), Ariz. Legis. Hist. 27-29.
[39] 70 Cong. Rec. 163 (1928), Ariz. Legis. Hist. 29.

"Mr. Bratton. Discussing the subject of water separate and apart from all other features of the bill, there seems to be a difference of 400,000 acre-feet between Arizona and California.

"Mr. Johnson. So there seems.

"Mr. Bratton. Without taking sides either way, we in the upper-basin States desire to adjust the whole matter satisfactorily to all of the States concerned. Any other attitude would be unbecoming a State.

"Mr. Johnson. I am sure that is the attitude of the gentlemen who confront me here.

"Mr. Bratton. . . . [A] difference of 400,000 acre-feet should not be permitted to defeat the entire proposal. . . . I want to join with the Senator from Utah (Mr. King) in saying that it is the earnest desire of the upper-basin States to aid the lower-basin States in adjusting and composing these differences and passing this legislation in a form that will be reasonably satisfactory to the two States and the other five as well.

"Mr. Johnson. I am sure that is so."[40]

At one point in the debate, Senator King of Utah suggested that a suit in equity to determine the conflicting rights should be required as a condition precedent to any construction under the Act. Senator Hayden replied:

". . . The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of water. Then, who shall obtain that water in relative order of priority may be determined by the State courts."[41]

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[40] 70 Cong. Rec. 165-66 (1928), Ariz. Legis. Hist. 31-34.

[41] 70 Cong. Rec. 169 (1928), Ariz. Legis. Hist. 45.

Senator Pittman of Nevada also recognized the necessity for a congressional division among Arizona, California and Nevada of the main stream water available to the Lower Basin, as follows:

> "Arizona, as I understand, will ratify the agreement whenever there shall be a provision in the bill or a separate agreement between Nevada and Arizona and California dividing the water let down to the three lower States. Of the 7,500,000 acre-feet of water let down that river they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together."[42]

On December 8, 1928, Senator Bratton had printed an amendment to §4(a) requiring California to limit herself to 4,400,000 acre-feet plus one-half the surplus. In explaining his proposal, he stated:

> "As I understand, California holds to the belief that 4,600,000 acre-feet is an irreducible minimum. Arizona contends that a maximum of 4,200,000 acre-feet is the largest that she will consider. Personally, I am not wedded to either figure. The thing that is uppermost in my mind is to do equity and justice as nearly as can be done toward both States, and, at the same time, pass a bill that will be effectuated, and will secure the results which we all desire.
>
> "I think we should adopt that course. The two States have exchanged views, they have negotiated, they have endeavored to reach an agreement, and until now have been unable to do so. This controversy does not affect those two States alone. It affects other States in the Union and the Government as well.

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[42] 70 Cong. Rec. 232 (1928), Ariz. Legis. Hist. 67.

"Without undertaking to express my views either way upon the subject, I do think that if the two States are unable to agree upon a figure then that we, as a disinterested and friendly agency, should pass a bill which, according to our combined judgment, will justly and equitably settle the controversy. I suggested 4,400,000 acre-feet with that in view. I still hold to the belief that somewhere between the two figures we must fix the amount, and that this difference of 400,000 acre-feet should not be allowed to bar and preclude the passage of this important measure dealing with the enormous quantity of 15,000,000 acre-feet of water and involving seven States as well as the Government."[43]

* * * * * *

"Mr. President, it is perfectly obvious to all of us that we have an immense project here, respecting which the two States, California and Arizona, can not agree. The dispute has narrowed itself primarily to 400,000 acre-feet of water, California saying that 4,600,000 acre-feet is her irreducible minimum and Arizona insisting that California shall be limited to 4,200,000 acre-feet.

"If this legislation shall be effectuated, the dam constructed, and the river controlled, and the benefits designed to be accomplished by the measure given full fruition, these States must ratify the compact. In my judgment that will never be accomplished if we give to one all that she asks and deny to the other everything she seeks.

"It seems to me, therefore, Mr. President, that in justice to the two States, they having been unable to agree, we should tender our offices by dividing the difference and requiring California to limit herself in her act of ratification, irrevocably and uncondi-

[43] 70 Cong. Rec. 333 (1928), Ariz. Legis. Hist. 71.

tionally, to a maximum consumptive use of 4,400,000 acre-feet. That divides the difference and is the amount fixed in the amendment I have proposed. It differs from the proposal of the Senator from Colorado by reducing California's claim 200,000 acre-feet. It differs from the amendment of the Senator from Arizona by increasing California's consumptive use by 200,000 acre-feet.

"I believe this is an equitable solution of the problem. It may not be entirely satisfactory to either State, but in my judgment it is the best compromise that is available at this time."[44]

The Bratton amendment was adopted.[45]

After Senator Hayden had withdrawn his amendment to §4(a) for parliamentary reasons,[46] he reoffered his proposal which would require California to give advance approval to a tri-state compact and stated:

"Mr. President, an examination of the amendment offered by the Senator from Colorado (Mr. Phipps) will disclose that it proposes that the State of California shall agree with the United States, for the benefit of the States of Arizona and Nevada, that the aggregate annual consumptive use of water from the Colorado River by the State of California shall not exceed 4,400,000 acre-feet. Further, that the State of California may have one-half of any excess or surplus waters unapportioned by the Colorado River compact.

"The first part of my amendment is a mere corollary to the amendment offered by the Senator from Colorado. It provides that of the remainder of

[44] 70 Cong. Rec. 385 (1928), Ariz. Legis. Hist. 88-89.

[45] 70 Cong. Rec. 387 (1928), Ariz. Legis. Hist. 97.

[46] 70 Cong. Rec. 382 (1928), Ariz. Legis. Hist. 84.

the seven and one-half million acre-feet there shall be apportioned to the State of Nevada 300,000 acre-feet, and to the State of Arizona 2,800,000 acre-feet, which, combined with 4,400,000 acre-feet which the State of California will use, completely exhausts the seven and one-half million acre-feet apportioned in perpetuity to the lower basin.

"The second proposal in my amendment is that the State of Arizona may annually use one-half of the surplus or unapportioned water, which is likewise a corollary to the proposal made by the Senator from Colorado, which likewise disposes of the total quantity of surplus or unapportioned waters in the lower basin."[47]

Senator Pittman, in commenting on the Hayden amendment, said:

"The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only an insignificant quantity, 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get; but there is just one other phase of the matter. The amount that either one of those States is entitled to under this legislation may be reduced if at some future time it is agreed, by treaty or contract or otherwise, that a certain amount of this water should, in justice, be used in Mexico."[48]

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[47] 70 Cong. Rec. 459-60 (1928), Ariz. Legis. Hist. 101-02.

[48] 70 Cong. Rec. 468 (1928), Ariz. Legis. Hist. 123.

And further:

> "As I understand this amendment, Arizona today has practically allocated to it 2,800,000 acre-feet of water in the main Colorado River."[49]

Senator Pittman then objected to the provision in the Hayden amendment which would require California to give advance approval to a tri-state compact. He stated that he felt it was improper to coerce one state into agreeing with another and that they should be given full freedom to compact. Senator Hayden then agreed to change the language of his proposal to make the tri-state compact provision permissive rather than mandatory.[50] Senator Pittman then went on to say:

> "Mr. President, this question has been here now for seven years. The seven States have been attempting to reach an agreement. Apparently the Senate of the United States is about to reach an agreement as to what ought to be done. The Senate has already stated exactly what it thinks about the water. That might have been an imposition on some States. Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason."[51]

These excerpts from the Senate debate on the Project Act demonstrate that the matter of principal concern was a division of water among Arizona, Nevada and California which would bring about ratification of the Colorado River

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[49] 70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. 126.

[50] 70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. 126-30.

[51] 70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. 130.

Compact by all the states. The Senate spent a large part of the time in working out what it considered to be a fair and equitable apportionment of the water and finally split the difference between the 4,600,000 acre-feet demanded by California and the 4,200,000 acre-feet conceded by Arizona. This resulted in the allocation of 4,400,000 acre-feet to California, 2,800,000 acre-feet to Arizona and 300,000 acre-feet to Nevada, with California and Arizona to share equally in the excess over 7,500,000 acre-feet.

Senator Johnson of California agreed to accept the Hayden amendment as long as it was understood that California was not being coerced into entering into a compact. In this connection, Senator Pittman observed:

> "We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that."[52]

It is inconceivable that the Senate would have devoted so much time and effort to working out the precise quantities of water which should be allocated to each state if any member supposed for a moment that there was being delegated to the Secretary of the Interior the authority to determine this matter in his discretion through the water delivery contracts. The Senators all felt they were under an obligation to settle the long-standing dispute between Arizona and California by setting forth in the Project Act an allocation of water to which the contracts made by the Secretary were required by §5 to conform.

The provisions of §5, which require the Secretary's contracts to "conform to paragraph (a) of section 4 of this Act . . .", can relate only to the division of water set out in §4(a). The Secretary has no authority to vary the formula

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[52] 70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. 131.

thus established. His water contracts must conform precisely to this formula in the absence of a different apportionment by the states under the provisions of §8(b).

Accordingly, it is clear that the existing water delivery contracts made by the Secretary of the Interior, insofar as they do not comply with the statutory formula established by Congress, are without legal authority and void.

C. The Water Delivery Contracts

The Special Master recommends that existing water delivery contracts entered into by the Secretary of the Interior be upheld as valid and binding, with the exception of Article 7(d) of the Arizona contract (Appendix E, pp. 37a-38a), amended Article 5(a) of the Nevada contract (Appendix G, p. 56a), and a Special Use Contract between the United States and Arizona-Edison Company, Inc. (Rep. 201, 220-21, 237-47).

We agree with the finding that the articles of the Arizona and Nevada contracts referred to are invalid for the reasons assigned by the Special Master, namely: they are not for permanent service, they violate the direction of §18 of the Project Act (Appendix B, pp. 25a-26a) that state law shall govern intrastate water rights and priorities, they are inconsistent with the §4(a) limitation on California's use of main stream water and they defeat the main stream allocation by introducing tributary considerations into a main stream apportionment (Rep. 237-47). We contend that these contractual provisions are also invalid for the additional reasons discussed immediately below. Furthermore, for the reasons hereafter stated, we regard as erroneous the Master's finding that Article 7(b), (f), and (g) of the Arizona contract are valid (A Exc. 8).

(1) The Arizona Contract

In the Arizona water contract (Appendix E, pp. 35a-44a), the United States agrees to deliver to Arizona from Lake Mead "so much water as may be necessary for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet" (Art. 7(a)). Article 7(b) of the contract also provides for delivery from Lake Mead storage of "one-half of any excess or surplus waters unapportioned by the . . . Compact." These quoted provisions comply with §4(a) of the Project Act.

However, Article 7(b) also provides that deliveries to Arizona of such unapportioned water shall be "less such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article". In subdivision (f) Arizona "recognizes the right" of the United States and Nevada to contract for annual beneficial consumptive use within Nevada for agricultural and domestic uses of one twenty-fifth "of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact . . . ." By subdivision (g) Arizona "recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact . . . ."

This attempted contractual "recognition" of water rights in Nevada, New Mexico and Utah is a conspicuous departure from the formula prescribed by §4(a). If given effect, these provisions will result in a division of water among Lower Basin states to which Congress has not con-

sented and which it has not authorized. As such, the provisions referred to are beyond the authority of the Secretary of the Interior and are null and void.

The Arizona water contract does not conform to §4(a) in another important respect. It provides in Article 7:

> "(d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead. . . ."

These provisions, insofar as they provide for the reduction of the allocation of main stream water made to Arizona by the Project Act, are likewise beyond the authority conferred upon the Secretary by the Act and are of no legal effect.

However, even if the Project Act be viewed, as the Special Master construes it, as providing authority for the Secretary to contract for the apportionment of main stream water among the States of Arizona, California and Nevada, rather than as itself making such an apportionment by prescribing a formula to which the Secretary's water delivery contracts must precisely conform, the provisions of Article 7(b), (d), (f) and (g) of the Arizona water delivery contract are nevertheless invalid because they are contrary to the provisions of the Project Act.

The Special Master has found that Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract, which relieve the Secretary of his obligation to deliver main stream water to those states at or below Boulder Dam to the extent that consumptive uses in such states diminish the flow into Lake Mead, are invalid because they violate the Project Act requirement that "contracts respecting

water for irrigation and domestic use shall be for permanent service" and for the reason that they introduce tributary considerations into a main stream apportionment contrary to the provisions of the Project Act (Rep. 237-47).

The same reasoning which caused the Special Master to reject these provisions of Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract likewise establish the invalidity of those portions of Article 7(b), (f) and (g) of the Arizona contract to which we have previously objected.

Article 7(b) of the Arizona contract, after providing for the delivery to Arizona of one-half of the excess or surplus water unapportioned by the Colorado River Compact, authorizes the Secretary to subtract therefrom "such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article." Article 7(f) of the Arizona contract provides for the recognition by Arizona of the right of the United States and the State of Nevada to make a contract for the "use of 1/25 (one twenty-fifth) of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963, as provided in Article III(f) and Article III (g) of the Colorado River Compact."

These provisions purport to authorize a diminution of the quantity of water required to be delivered under the Arizona contract if and when the United States and the State of Nevada should contract as provided in this Article. They clearly provide for a contingency which leaves uncertain the extent of Arizona's rights under its water delivery contract and are "contrary to the command of

Section 5 that 'contracts respecting water for irrigation domestic uses shall be for permanent service . . . .' " (Rep. 237). The intent of Congress in requiring water delivery contracts to be for permanent service is carefully analyzed in the Special Master's Report (Rep. 238-40). The reasoning of the Special Master which demonstrates that Article 7(d) of the Arizona contract frustrates that congressional intent likewise exposes the invalidity of these provisions of Article 7(b) and (f) of the Arizona contract.

We are not at all certain that we properly understand just what was intended by Article 7(g) of the Arizona contract when considered in conjunction with Article 7(b) of that contract. Article 7(g), considered alone, gives rise to no particular difficulty, but when read in conjunction with the related portions of Article 7(b) it appears to provide for the deduction from Arizona's one-half share of excess or surplus water such quantities as shall equal the equitable shares of New Mexico and Utah of (1) water apportioned by the Colorado River Compact to the Lower Basin and also (2) water unapportioned by the Compact.

Since neither New Mexico nor Utah has access to the main stream of the Colorado River in the Lower Basin, the uses of Colorado River System water in those states must be from tributaries of the main stream. Accordingly, if Article 7(b) and (g) of the Arizona contract be construed as providing for the reduction of Arizona's share of main stream water by reason of uses in New Mexico and Utah, or in either of those states, it obviously operates to "defeat the mainstream allocation, otherwise completely provided for in the contracts, by introducing System, *i.e.*, tributary, considerations in a mainstream apportionment" (Rep. 242). As the Special Master said with reference to Article

7(d) of the Arizona contract: "To enforce these provisions would distort the mainstream apportionment and leave some mainstream water undisposed of." (Rep. 242)

Moreover, the terms of Article 7(g), when construed in conjunction with Article 7(b), likewise generate uncertainty regarding Arizona's entitlement under its water delivery contract by providing for contingencies which make that entitlement subject to reduction. Hence these terms are contrary to the requirement of §5 of the Project Act that water delivery contracts shall be for permanent service.

(2) The Nevada Contracts

By its water contracts with Nevada (Appendices F, G, pp. 45a-58a) the United States agrees to deliver from Lake Mead storage to Nevada "so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year" (amended Art. 5 (a), Appendix G, p. 56a).

The formula of §4(a) of the Project Act entitles Nevada to contract for delivery from Lake Mead storage for use in Nevada of 300,000 acre-feet of water per annum. Under §5(a) of Nevada's contracts, however, there are included in the 300,000 acre-feet of water to be delivered to Nevada "all other waters diverted for use within . . . Nevada from the Colorado River system," *i.e.*, water from Lower Basin tributaries in Nevada. In addition to the reasons assigned by the Special Master for the invalidity of these provisions, they do not conform to the §4(a) formula and hence are beyond the authority of the Secretary of the Interior and are of no legal efficacy.

(3) The California Contracts

We agree with the Special Master that, to the extent the delivery requirement of 5,362,000 acre-feet under the California contracts exceeds 4,400,000 acre-feet, the overage of 962,000 acre-feet may not properly be satisfied except out of California's share of excess or surplus water (Rep. 208).

We further agree that, in the event there is in any year less than 7,500,000 acre-feet of main stream water available for use by Arizona, California and Nevada, California's entitlement under its contract is 4.4/7.5 of the quantity available (Rep. 306).

D. Meaning and Measurement of "Consumptive Use"

Arizona agrees with the Master's conclusion that the §4(a) apportionment, including the California limitation, is to be measured in terms of consumptive use of water, defined as diversions from the river less return flow (Rep. 182-225).

We also concur with the Master's holding that the delivery obligations under the Secretary of the Interior's water delivery contracts are to be measured, as provided in those contracts, at the points of diversion (Rep. 186). Accordingly, Arizona takes no exception to the Master's conclusion that:

> "Consumptive use is to be measured by diversions at each diversion point on the mainstream less returns to the mainstream, measured or estimated by appropriate engineering methods, available for use in the United States or in satisfaction of the Mexican treaty obligation." (Rep. 186-87; and see Rep. 225)

In this connection, the Master has directed that each user of water shall be charged only for the amount of water actually diverted and which does not return to the main

stream and that losses of water which occur before diversion are a diminution of available supply under §4(a) and are not a consumptive use (Rep. 187).

Arizona suggests, however, that terms be incorporated in the final decree providing that ordered but unused water shall be charged to the party ordering it (A Exc. 38). The record establishes that frequently in the past water released from Hoover Dam on order was not used by the ordering party with the result that it flowed downstream to Mexico, although it was not and could not be credited to satisfaction of the Mexican Treaty obligation (Tr. 863-67, 974-75, 21143-76). Arizona submitted to the Master provisions for inclusion in his Recommended Decree which were designed to correct this situation and discourage improvident practices. Exception has been filed to the Master's failure to accept this proposal (A Exc. 38). The Court is respectfully requested to make appropriate remedial provisions in its decree.

E. Release From Storage of Apportioned But Unused Water

Arizona has excepted (A Exc. 33) to the provisions of Article II(B)(8) of the Special Master's Recommended Decree, which are as follows:

> "If, in any one year, water apportioned for consumptive use in a state will not be consumed in that state, whether for the reason that delivery contracts for the full amount of the state's apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason, nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states. No rights to the recurrent use of such water shall accrue by reason of the use thereof . . . ."

The above quoted language, in providing that water apportioned to but not consumed by one state in any year may be delivered to the other states, contains no limitation that the aggregate of such water and the water apportioned to such other states shall be either within the contract entitlements of these states or within the limitation specified by the Project Act and the Limitation Act. Insofar as these provisions of the Recommended Decree vest in the Secretary of the Interior the discretion to deliver water in excess of the quantities specified by the Project and Limitation Acts or in excess of the amounts provided in the water delivery contracts of the Secretary of the Interior, they are clearly in violation of both the Project Act and the Limitation Act.

The fact that one state may not require or be in a position to utilize its full share of Colorado River water in any one year cannot operate to nullify the command of the Project Act that "the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California . . . shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact" (§4(a)). Nor does that fact sanction the delivery of water not contracted for, in violation of the provisions of the Project Act, that "no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated" (§5).

We recognize that if one of the Lower Basin main stream states does not call for its full entitlement of stored water in any one year, it is only fair to allow this uncalled for water to be used to augment deliveries of water to other states up to their full entitlement under the Project and

Limitation Acts and their water delivery contracts with the Secretary of the Interior. However, to the extent that the delivery of such water would exceed the amounts permitted by the Project and Limitation Acts or the water delivery contracts, it is likewise proper and fair that such quantities of uncalled for water be retained in storage to increase the supply available for apportionment among the Lower Basin main stream states in the succeeding year or years.

Accordingly, Arizona proposes that the following be substituted for Article II(B)(8) in the Special Master's Recommended Decree:

> "(8) If, in any one year, main stream water apportioned for consumptive use in a state will not be ~~consumed~~ diverted for use in that state, ~~whether for the reason that delivery contracts for the full amount of the state's apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason,~~ nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states; provided, however, that nothing herein contained shall be construed as authorizing the diversion or use of water without a contract with the Secretary of the Interior as required by the Boulder Canyon Project Act or in excess of the amounts permitted by said Act, the California Limitation Act and contracts made by the Secretary of the Interior for the delivery of water pursuant to Section 5 of the Boulder Canyon Project Act. No rights to the recurrent use of such water shall accrue by reason of the use thereof. . . ."[53]

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[53] Deletions from the Recommended Decree have been lined out; additions have been underlined.

PART II

The Claims of the United States to Water

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The Claims of the United States to Water

QUESTIONS PRESENTED

7. Whether, after the admission to statehood of Arizona, California and Nevada, the United States had the power to reserve water of the Colorado River, a navigable stream, for use by federal establishments within those states.

8. Whether, prior to the admission of Arizona to statehood, a reservation of water of the Colorado River for use on Indian Reservations within the Territory of Arizona could be made, without a clear manifestation of an intent to reserve such water; and as a subsidiary question:

A. Whether there was a clear manifestation of an intent to reserve water of the Colorado River for use on Indian Reservations within the Territory of Arizona.

9. Whether the power to reserve water for federal purposes resides exclusively in Congress or whether it may also be exercised by the President without authorization by Congress.

10. Whether, assuming a reservation of water for use on Indian Reservations has been made, the quantity of water reserved should be measured by the water needed to irrigate all the potentially irrigable acreage within each Reservation or by the needs of the Indians.

11. Whether, regardless of the existence or absence of a reservation of water for use on Indian Reservations, the

extent of Indian water rights should be determined by the application of equitable principles.

12. Whether, in withdrawing land for the Gila National Forest, the United States reserved water from the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the forest.

STATEMENT OF THE CASE

I. Claims of the United States to Main Stream Water

A. Indian Reservations

Of the five Indian Reservations for which the Master has found there was a withdrawal of main stream water (Rep. 260), three are situated wholly or in part in Arizona: Colorado River, Fort Mohave and Cocopah.

Colorado River Indian Reservation

This Reservation is situated on both sides of the Colorado River in Arizona and California in arid desert valley country. The inhabitants of the Reservation, the Colorado River Indian tribes, have an agricultural economy. The Master estimates that 1,100 or 1,200 of the 1957 tribal population of approximately 1,300 live on the Reservation (Rep. 86).

Water for irrigation of the Arizona portion is diverted from the Colorado River at the northern part of the Reservation by a diversion dam called Headgate Rock Dam.

In 1864, the Commissioner of Indian Affairs recommended to the Secretary of the Interior the abandonment of the system of small Indian Reservations scattered throughout the West and the adoption of a system of large Reservations sufficiently extensive to furnish homes and

means of support for all the Indians of the West (U. S. 512, p. 21).

In this connection he proposed the creation of a Reservation along the Colorado River in Arizona consisting of 75,000 acres, the plan for which had evolved at a meeting between the Superintendent of Indian Affairs and the chiefs of the Yumas, Mohaves, Yavapais, Hualapais and Chemehuevis. The combined population of these tribes was considered to be about 10,000 (U. S. 512, p. 21; U. S. 513, p. 156).

On March 2, 1865 this suggestion was considered by Congress (U. S. 502, p. 1320) and on the following day the Colorado River Indian Reservation was created by Act of March 3, 1865, 13 Stat. 541, 559 (U. S. 501). Between 1865 and 1876, the Colorado River Reservation was enlarged by executive order from 75,000 acres to about 260,000 acres.

The Special Master has concluded that for the benefit of the Colorado River Reservation the United States has the right to the annual diversion of a maximum of 717,148 acre-feet of water from the main stream or to the quantity of main stream water necessary to supply the consumptive use required for the irrigation of 107,588 acres and for satisfaction of related uses, whichever is less, with various priority dates (Rep. 273-74). This conclusion is based upon the Master's finding that the United States is entitled to sufficient water to irrigate all the irrigable land in the Reservation (Rep. 265).

Fort Mohave Indian Reservation

This Reservation is situated in the States of Arizona, California and Nevada in the general area of their common borders. Embracing approximately 38,000 acres, the Reservation's climate and topography are characteristic of an arid desert valley (Rep. 85).

On August 4, 1870, the War Department by general order set aside two tracts of land containing 14,696.81 acres, more or less, for military purposes. The first of these was called Camp Mohave and contained 5,582 acres, more or less. The second was called Camp Mohave Hay and Wood Reservation and contained 9,114.81 acres, more or less (U. S. 1301).

The Acting Secretary of War recommended, on September 18, 1890, that the "military reservation of Fort Mohave, Arizona, be transferred and turned over to the Department of the Interior for Indian School purposes under the Act of July 31, 1882, entitled 'an Act to provide additional Industrial Training Schools for Indian youth and authorizing the use of unoccupied military barracks for such purposes' ". This recommendation was approved by the President on September 19, 1890 (U. S. 1302, 1303).

On March 18, 1903, an administrative ruling held that "all that intermediate tract of land between the military and the hay and wood reservation bounded on the west by the Colorado River and on the east by a line running from Station No. 1 of the hay and wood reservation to Station No. 1 of the military reservation, was included in the tract reserved for Indian school purposes" (U. S. 1301).

By executive order dated December 1, 1910 the President directed that additional lands "not included within the present boundaries of the Fort Mohave Indian Reservation . . . be, and the same are hereby, withdrawn from settlement and entry and set apart as an addition to the present Fort Mohave Indian Reservation in Arizona, for the use and occupation of the Fort Mohave and such other Indians as the Secretary of the Interior may see fit to settle thereon . . . ." (U. S. 1304)

On February 2, 1911, the President cancelled the executive order of December 1, 1910, but again set apart addi-

tional lands for the identical purposes specified in the 1910 order (U. S. 1305).

The Special Master has found that there are 18,974 irrigable acres in the Fort Mohave Reservation and has concluded that for the benefit of the Reservation the United States has the right to the annual diversion of 122,648 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of such irrigable land and related uses, whichever is less, with priority dates of September 18, 1890, for lands transferred by the executive order of that date and of February 2, 1911, for land reserved by the executive order of that date (Rep. 282-83).

Cocopah Indian Reservation

This Reservation was established by an executive order of September 27, 1917 (Rep. 267)—after Arizona had been admitted to statehood.

The Reservation is composed of two tracts located southwest of Yuma in Arizona. Colorado River water is delivered to the Reservation lands through facilities of the Yuma Reclamation Project (Rep. 268).

The Master has found that 431 of the approximately 500 acres comprising the area of the Reservation are irrigable (Rep. 88, 268), and on this basis he has concluded that for the benefit of this Reservation the United States has the right to the quantity of main stream water necessary to supply the consumptive use required by that number of acres and for the satisfaction of related uses or to the annual diversion of a maximum of 2,744 acre-feet of water from the Colorado River, whichever is less, with a priority date of September 27, 1917 (Rep. 268).

B. Recreation Areas and Wildlife Refuges

Lake Mead National Recreation Area

This area is located in Arizona and Nevada. It is the only establishment administered by the Bureau of Land Management currently diverting water from the main stream of the Colorado River in the Lower Basin (Rep. 294).

Executive orders dated May 3, 1929 (No. 5105) and April 25, 1930 (No. 5339) withdrew lands in Arizona and Nevada pending determination as to the advisability of including such lands in a national monument. In 1936, Congress appropriated funds for the operation of the Boulder Canyon Project Area which included these lands.

Although the Master found that there is not sufficient evidence to make a determination of the ultimate water requirements of this recreation area, he nevertheless concluded that the United States has the right to divert main stream water in quantities reasonably necessary to fulfill the purposes of the area, with priority dates of May 3, 1929 and April 25, 1930 (Rep. 295).

Havasu Lake National Wildlife Refuge

An executive order of January 22, 1941 (No. 8647) established the Havasu Lake National Wildlife Refuge and set apart approximately 37,370 acres of land owned by the United States in Mohave and Yuma Counties, Arizona, and San Bernardino County, California, as a refuge and breeding ground for migratory birds and other wildlife (Rep. 298).

On February 11, 1949, the Assistant Secretary of the Interior by Public Land Order 559 added approximately 1,677 acres in Arizona and approximately 1,080 acres in California to the Havasu Lake National Wildlife Refuge.

The Master has found that in withdrawing these lands the United States intended to reserve rights to the use of enough Colorado River water to fulfill the purposes of the refuge and that annual diversion of 41,839 acre-feet and annual consumptive use of 37,339 acre-feet of Colorado River water will satisfy the estimated requirements of the refuge. He concluded that the United States has the right to either of these amounts, whichever is less, for use in the refuge, with priority dates of January 22, 1941 and February 11, 1949 (Rep. 299).

Imperial National Wildlife Refuge

An executive order of February 14, 1941 (No. 8685) established the Imperial National Wildlife Refuge and set apart approximately 51,090 acres of land owned by the United States in Yuma County, Arizona, and Imperial County, California, as a refuge and breeding ground for migratory birds and other wildlife (Rep. 299-300).

Here again, the Master has found that by withdrawal of these lands the United States intended to reserve rights to the use of so much main stream water as might be reasonably needed to fulfill the purposes of the refuge and he found also that annual diversions of 28,000 acre-feet and annual consumptive use of 23,000 acre-feet of Colorado River water will satisfy the estimated water requirement of the refuge in fulfillment of a development plan formulated for the refuge (Rep. 300). Accordingly, he concluded that the United States has the right to either the stated amount of diversion or of consumptive use, whichever is less, for use in the refuge, with a priority date of February 14, 1941 (Rep. 300).

II. Claims of the United States to Tributary Water

The Master has found that there is no justiciable controversy with respect to any of the tributaries in the Lower Basin except the Gila River System (Rep. 321-24).

Arizona agrees with the Special Master's disposition of the dispute between Arizona and New Mexico with respect to the allocation of the waters of the Gila River between these two states. Arizona disagrees, however, with the Master's resolution of the controversy between it and the United States with respect to the reservation of water for use in the Gila National Forest (Rep. 332-35) (A Exc. 29-30).

Gila National Forest

The Master found that the Gila National Forest was created as a public reservation by a presidential proclamation dated March 2, 1899 and was subsequently enlarged and modified (Rep. 342).

The Master also found that the United States intended, when it withdrew this forest from entry, to reserve the water necessary to fulfill the purposes for which the forest was created (Rep. 342). Accordingly, he has concluded that the United States has the right to divert water from the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest, with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used (Rep. 343).

SUMMARY OF THE ARGUMENT

Arizona has filed exceptions to those parts of the Special Master's Report and Recommended Decree which sustained certain claims of the United States to main stream

water of the Colorado River for use on Indian Reservations and other federal establishments created out of public land in Arizona (A Exc. 10-28).

Relying basically on a single decision of this Court,[54] which involved the reservation of water of a non-navigable stream for use on an Indian Reservation created by treaty in the Territory of Montana, the Master has concluded that the federal government has the power to reserve water of both navigable and non-navigable streams for the benefit of all federal establishments, regardless of whether the reservation is made by treaty, statute or executive order. He also fails to recognize any distinction between the power of the United States to dispose of navigable water within a territory and its power to dispose of navigable water within a state.

In upholding claims of the United States on behalf of Indian tribes, the Special Master has conceived and applied the principle that the very establishment of an Indian Reservation impliedly reserves in perpetuity for use on the Reservation whatever quantity of water may be required in the indefinite future to irrigate every irrigable acre within the Reservation, without regard to the actual needs of the Indians on the Reservation. The resulting water rights are held to be of fixed magnitude and priority and appurtenant to defined lands, so that their use is not restricted to Indians but may be transferred to non-Indians (Rep. 254-66).

The questions regarding water rights of the United States for use in the Lake Mead National Recreation Area and in the Lake Havasu and Imperial Wildlife Refuges are similarly dealt with by application of the same principles invoked in the Special Master's treatment of Indian Reservations (Rep. 297-300).

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[54] *Winters* v. *United States*, 207 U. S. 564 (1908).

The Master's Report does not examine into the source of the federal power to reserve water of a navigable stream for use on federal establishments. Rather the Master states that "it is unnecessary, for the purposes of this case, to explore the origin or limits of such power to reserve water against subsequent appropriators" (Rep. 259).[55]

The Special Master fails to recognize the distinction between the legal principles applicable to navigable waters and those which govern non-navigable streams. He fails to give effect to the well established rule that, when a state is admitted to the Union, dominion over its navigable water passes from the United States to the newly created state. Thereafter the federal government is without power to reserve the water of a navigable stream for use on federal establishments,[56] since its only authority over such water is that which is vested in it by the Commerce Clause and the treaty-making provisions of the Constitution.

Prior to statehood, the right of the United States in navigable water of a territory, unlike its title to territorial land, is not absolute but the right is held for the benefit of the people and in trust for the future state.

The power of the United States to reserve navigable water of a territory prior to statehood for use on federal establishments resides exclusively in Congress under the so-called "Public Property Clause" of the Constitution (art. IV, §3, cl. 2), which provides that "the Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other

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[55] In fairness and candor we should advise the Court that neither the briefs nor oral arguments of the parties before the Special Master presented these considerations to him in any substantial degree.

[56] All federal establishments on the main stream of the Colorado River in Arizona, except the Colorado River and Fort Mohave Indian Reservations, were created after Arizona became a state.

Property belonging to the United States". No authority exists in the Executive Department of the federal government to dispose of navigable waters for federal purposes by executive order or otherwise in the absence of a definite and explicit delegation from Congress.

In any event, wherever the power to reserve these rights may be held to reside, it must be exercised in a manner clearly manifesting the intent to make a reservation of water. An inference that such rights were reserved *in navigable water* may not be drawn simply from the fact that an Indian Reservation is created in a generally arid region adjacent or proximate to a navigable stream.

The Colorado River Indian Reservation was created by Act of Congress and enlarged by executive orders. The Fort Mohave and Cocopah Indian Reservations were created and the former was enlarged by executive orders. None of these instruments can be construed to contain an express manifestation of intent to reserve water of the Colorado River for the benefit of the Indians or Indian lands. In fact, they contain no mention of water at all. Had the Master considered these documents in the light of the applicable legal principles, he would have found no such manifestation of intent as is required to reserve navigable water and would therefore have been obliged to conclude, contrary to his Report, that there had been no reservation of water.

Finally, even should it be held that water from the Colorado River was reserved by implication for the benefit of these Indian Reservations, the quantity of water reserved should be measured by the reasonably foreseeable needs of the Indians as shown by past experience rather than by the possible needs of the potentially irrigable acres. The holding of the Master permits the maximum use of water and leads to results which are inequitable and indeed, in some instances, unrealistic.

The Special Master has held that uses of water from the main stream of the Colorado River on federal establishments are chargeable to the entitlement of the state in which the use occurs (Rep. 247). Thus uses on the Colorado River, Fort Mohave and Cocopah Indian Reservations in Arizona are charged to Arizona's share of main stream Colorado River water, even though that state has no jurisdiction or control over such uses. Therefore, whether or not there has been a reservation of water for federal establishments, the question is presented as to what principles should be applied by this Court in order to determine, as between the United States on behalf of these Reservations and Arizona on behalf of other users within the state, rights to the use of Arizona's share of Colorado River water.

We suggest that the same general considerations which have led the Court to employ principles of equitable apportionment in the allocation of water between states, absent a statutory apportionment, are applicable here. While Indian tribes today do not have the status of a true sovereign, nevertheless the laws of the state are generally without force within the boundaries of Indian Reservations within the state. In addition, since Indians are wards of the federal government, a true sovereign, it is peculiarly appropriate that equitable principles should be applied in weighing the claims of the United States on their behalf against those of the State of Arizona on behalf of other users within the state.

The Special Master has found that there is not sufficient evidence to make a finding of the ultimate water requirements of the Gila National Forest (Rep. 342), but he finds that in withdrawing lands for the use of the forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the

forest (Rep. 342). He concludes that the United States has the right to divert water from the main stream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the forest, with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used (Rep. 343). He also states that private rights in the Gila River System recognized by the Recommended Decree are subordinate to the rights of the United States to divert water for the Gila National Forest to the extent that the private rights are junior in time (Rep. 335).

Although Arizona is not in agreement with the conclusion of the Special Master that the United States possesses the power to reserve water for use in the Gila National Forest, it is not necessary that that question be resolved in this litigation, since congressional legislation demonstrates that there was no intent to reserve water for national forests, but to the contrary that Congress intended the acquisition of rights to water for national forests to be governed by the laws of the state in which the forests are located.

ARGUMENT

IV

After Arizona was admitted to statehood, the United States had no power to reserve water of the main stream of the Colorado River for the use of federal establishments within Arizona.

This Court has consistently held that upon the admission of a territory to statehood, sovereign rights in the water and beds of navigable streams become vested in the newly created state, which acquires absolute and complete sover-

eignty over them, subject only to the power of the United States over navigation under the Commerce Clause. *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10 (1935); *United States* v. *Utah,* 283 U. S. 64 (1931); *Massachusetts* v. *New York,* 271 U. S. 65 (1926); *Port of Seattle* v. *Oregon & W. R. R.,* 255 U. S. 56, 63 (1921); *United States* v. *Mission Rock Co.,* 189 U. S. 391 (1903); *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690 (1899); *Knight* v. *United Land Ass'n,* 142 U. S. 161 (1891); *Goodtitle* v. *Kibbe,* 50 U. S. (9 How.) 471 (1850); *Pollard* v. *Hagan,* 44 U. S. (3 How.) 212 (1845); *Martin* v. *Waddell's Lessee,* 41 U. S. (16 Pet.) 367 (1842).

Thus in *Martin* v. *Waddell's Lessee* it was said regarding the original states:

> "For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." 41 U. S. (16 Pet.) at 410.

That the same absolute sovereignty over navigable waters exists in newly admitted states was held in *Knight* v. *United Land Ass'n,* 142 U. S. at 183:

> "It is the settled rule of law . . . that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty, and jurisdiction. . . ."

In *United States* v. *Mission Rock Co.,* the Court quoted with approval the following excerpt from *Weber* v. *State Harbor Comm'rs,* 85 U. S. (18 Wall.) 57, 65-66 (1873), regarding California tidelands:

> "'Although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they [the United States] held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government.'" 189 U. S. at 404.

Accordingly, it was held in *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. at 63:

> "The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a state, the owner of the navigable waters within its boundaries and of the land under same. . . . The character of the state's ownership in the land and in the waters is the full proprietary right. The state, being the absolute owner of the tidelands and of the waters over them, is free, in conveying tidelands, either to grant with them rights in the adjoining water area, or to completely withhold all such rights."

After statehood, then, the United States has no power whatever to reserve for the use of federal establishments water of navigable streams, title to which has passed to and vested in the state upon its admission to the Union.

The Special Master does not sustain such power under the Commerce Clause and there is no support either in this record or in the law for the conclusion that the asserted reservation of water for federal establishments is an exercise of congressional power over navigation under the Commerce Clause.

Arizona was admitted to statehood on February 14, 1912. The Cocopah Indian Reservation was created September 27, 1917 (Rep. 267). The Lake Mead National Recreation Area was established by withdrawal of lands beginning May 3, 1929 (Rep. 294) and the Havasu Lake and Imperial National Wildlife Refuges were established January 22, 1941 and February 14, 1941, respectively (Rep. 298-300).

Since these federal establishments were all created after Arizona was admitted to statehood, the federal government was without power to make any reservation of water of the Colorado River, a navigable stream, for the use of these establishments within the state of Arizona and the Special Master is in error in holding that such water was reserved for use within these areas (A Exc. 15, 16, 23-28).

For these reasons, the Recommended Decree is erroneous and should not be adopted insofar as it provides for the delivery of water from Lake Mead for the benefit of the Cocopah Indian Reservation (Article II(C)(2)(b); Rep. 350), the Lake Mead National Recreation Area in Arizona and the Havasu Lake and Imperial National Wildlife Refuges (Article II(C)(f), (g) and (h); Rep. 352-53) (A Exc. 34).

V

No reservation of water of the main stream of the Colorado River has been made for the use of Indian Reservations in Arizona.

A. Power of the United States to Reserve Navigable Waters Before Statehood

Sovereign rights in the water and beds of navigable streams were examined and defined by Mr. Justice Gray in the leading case of *Shively* v. *Bowlby,* 152 U. S. 1, 57-58 (1894)[57]:

> "At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States.
>
> "Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the territory.
>
> "The new States admitted into the Union since the adoption of the Constitution have the same rights

[57] Referring to *Shively* v. *Bowlby,* this Court has said: "It is unnecessary, and it would be difficult, to add anything to the reasoning of that case." *United States* v. *Winans,* 198 U. S. 371, 383 (1905). Again, the Court has commented that the "whole subject has been clarified, after the fullest examination of all the authorities, in a most useful opinion by Mr. Justice Gray". *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77, 84 (1922).

as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

"The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States."

Thus, the right of the United States in navigable waters within federal territories, unlike its title to territorial lands, is not absolute, but is held by "the United States for the benefit of the whole people" and "in trust for" the future states. *Shively* v. *Bowlby,* 152 U. S. at 57.

It was once thought that this trusteeship prevented the United States from disposing of navigable streams or the beds thereof flowing within territories of the United States, even prior to their admission to statehood. *Pollard* v. *Hagan*, 44 U. S. (3 How.) 212 (1845).[58] However, the "dicta" to that effect in *Pollard* was limited in *Shively*, 152 U. S. at 28, 47, 48:

> "So much of the reasoning of the learned justice, as implied that the title in the land below high water mark could not have been granted away by the United States after the deed of cession of the territory and before the admission of the state into the Union, was not necessary to the decision, which involved only a grant made by Congress after the admission of Alabama, and which was followed in two similar cases in which Congress, after the admis-

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[58] In *Pollard* v. *Hagan*, the Court had stated in part:

"We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new States were formed; except for temporary purposes, and to execute the trusts created by the acts of Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the Treaty with the French Republic, of the 30th of April, 1803, ceding Louisiana.

* * * * * *

"When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it, to the same extent, in all respects, that it was held by the States ceding the territories.

* * * * * *

"Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding . . . ." 44 U. S. (3 How.) at 221, 222-23, 228-29.

sion of the state, had undertaken to confirm Spanish grants, made after the Treaty of San Ildefonso of 1800, and therefore passing no title whatever.

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"Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.

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"We cannot doubt . . . that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the territory."

In recognition of the duties of the United States as trustee of navigable waters within the territories for the benefit of future states, Congress long ago adopted a policy with regard to such waters (as distinguished from public lands), which was thus described in *Shively* v. *Bowlby,* 152 U. S. at 49-50:

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public

highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community."[59]

This congressional policy of treating navigable waters within federal territories and the lands under them as being held for the benefit of future states has long since become firmly "established". *United States* v. *Holt State Bank*, 270 U. S. 49, 58 (1926).

B. Power of the Executive to Reserve Navigable Water

Since all of the Fort Mohave and Cocopah Indian Reservations and all of the Colorado River Indian Reservation, except the original 75,000 acres which were withdrawn by Congress in 1865 (pp. 110-11, *supra*), were set apart by executive order, there is squarely presented the question of the power of the executive branch of the government to reserve

[59] A more recent statement by this Court concerning the meaning and effect of the "equal footing" clause may cast doubt upon the validity of the limitations placed on the rule announced in the *Pollard* case by the decision in *Shively* v. *Bowlby* and subsequent cases. See *United States* v. *Texas*, 339 U. S. 707, 712-20 (1950).

navigable water of a territory for federal establishments.[60] The question has never been decided by this Court. It was not until the decision in *United States* v. *Midwest Oil Co.*, 236 U. S. 459 (1915), that the Court sustained the presidential power to withdraw by executive order public lands from private acquisition after they had been opened by Congress to occupation and purchase. The executive power with regard to public lands was sustained despite the constitutional provision which vests in *Congress* the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (art. 4, §3, cl. 2). The issue was decided "in the light of the legal consequences flowing from a long-continued practice", 236 U. S. at 469; and on the basis of the Court's finding that during the period of eighty years before its decision the President "without express statutory authority—but under the claim of power so to do—[had] made a multitude of Executive Orders which operated to withdraw public land that would otherwise have been open to private acquisition". 236 U. S. at 469. The Court found congressional acquiescence in this presidential usage "on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice". 236 U. S. at 472-73.

The power to reserve by executive order federally owned lands, title to which is in the United States as absolute owner, and the power to reserve navigable territorial water, which is held by the United States in trust for future states, are of course two entirely different things. We have found no statute which authorizes the President to reserve navigable water for the benefit of federal establishments

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[60] The same question is also presented with respect to the Lake Mead National Recreation Area and Havasu Lake and Imperial National Wildlife Refuges, all of which were created and enlarged by executive orders.

nor, so far as we have been able to determine, are there any cases which have passed upon the existence of such executive power in the absence of statute.[61]

The question of the power of the Executive was raised but not decided in *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78 (1918). This Court ignored the executive order asserted as the source of the Indians' fishing rights there involved and sustained the reservation of the fishing rights as having been effected by the statute establishing the Indian Reservation.

Thirty years later, alluding to *Alaska Pacific Fisheries*, the Court noted in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 113-14 (1949):

> "This Court affirmed the decree as to the waters within 3,000 feet of the shore lines. Although in the brief a vigorous attack was made on the power to issue the proclamation covering the waters, the proclamation was not referred to in the unanimous opinion here. This Court felt compelled to decide the fisheries were included *in the language of the statute* by the purpose to assist the Indians to train themselves. Fishing was said to give value to the islands."

United States v. *Midwest Oil Co.*, 236 U. S. 459 (1915), is not a valid precedent for sustaining the existence of executive power to reserve navigable water. That decision, as we have seen, was based upon a delegation of power to set apart public lands, which was implied from long congressional acquiescence in the exercise of that particular power. Finding a similar assent and transfer of authority from Congress to the President is far more difficult, if not impos-

[61] The existence of the power in the Executive seems to have been questioned, at least impliedly, by Chief Justice Hughes in *United States* v. *Utah*, 283 U. S. 64, 88-89 (1931).

sible, with respect to the reservation of navigable water. In cases of land reserved by executive order, the acts of reservation were plain and well-known to Congress. With respect to the implied reservation of water rights by executive act, on the other hand, there can be no valid claim of congressional knowledge and acquiescence. That it was the intention to reserve water as well as land nowhere appears from any of the documents creating or enlarging the Reservations. Indeed, it was contrary to the policy of Congress itself to dispose of navigable waters so as to foreclose transfer of sovereignty over them to future states (pp. 125-29, *supra*). In the absence of knowledge or belief on the part of Congress that the Executive intended to reserve water with each withdrawal of land, it is impossible to infer that Congress acquiesced in or approved of such executive intent.

Hence, the inferred congressional delegation of power to the President which was found in *Midwest Oil* with respect to public lands cannot validly be relied upon to sustain the reservation of rights in navigable water by executive order or proclamation. As this Court stated in *Sioux Tribe* v. *United States*, 316 U. S. 317, 326 (1942):

> "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority. The basis of decision in *United States* v. *Midwest Oil Co.* was that, so far as the power to withdraw public lands from sale is concerned, such a delegation could be spelled out from long continued Congressional acquiescence in the executive practice. The answer to whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians must be found in the available evidence of what consequences were

> thought by the executive and Congress to flow from the establishment of executive order reservations." (footnote omitted)

Similarly, the fact that Congress has by implication delegated to the Executive the power to reserve public lands for public purposes does not establish that Congress has impliedly delegated to him the power to reserve navigable waters for use on those lands. Additional and independent evidence of a congressional delegation of such enlarged authority is necessary.

In *Sioux,* the Court could find no such evidence. Reviewing the history of executive order Reservations, the Court concluded that the power to convey a compensable interest in lands set apart for Indian Reservations had not been delegated to the President by Congress, stating:

> "Although there are abundant signs that Congress was aware of the practice of establishing Indian reservations by executive order, there is little to indicate what it understood to be the kind of interest that the Indians obtained in these lands" 316 U. S. at 328.

The Court noted that in 1892 the Senate Committee on Indian Affairs had expressed the opinion that under an executive order "the Indians were given a license to occupy the lands described in it so long as it was the pleasure of the Government they should do so, and no right, title, or claim to such lands has vested in the Indians by virtue of this occupancy".[62] It also regarded as "striking proof of the belief shared by Congress and the Executive that the Indians were not entitled to compensation upon the abolition of an executive order reservation" the fact that there

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[62] 316 U. S. at 328, quoting from S. Rep. No. 664, 52d Cong., 1st Sess. 2 (1892).

was an "absence of compensatory payments in such situations". 316 U. S. at 330. The Court concluded:

> "We conclude therefore that there was no express constitutional or statutory authorization for the conveyance of a compensable interest to petitioner by the four executive orders of 1875 and 1876, and that no implied Congressional delegation of the power to do so can be spelled out from the evidence of Congressional and executive understanding." 316 U. S. at 331..

By the same token, the Acts of Congress and the pronouncements of the Executive which recognize the need to acquire appropriative rights to the use of water in the Colorado River Indian Reservation (pp. 142-47, *infra*) are "a striking proof of the belief shared by Congress and the executive" that water had not been reserved for the use of that Reservation.

In view of the constitutional provision which vests in Congress the "Power to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (art. 4, §3, cl. 2) and since the question presented is an open one for decision in this Court, we believe its determination should be approached in the light of the principles expressed by Mr. Justice Day in his dissent in the *Midwest Oil* case, 236 U. S. at 511, quoting in part from *Kilbourn* v. *Thompson,* 103 U. S. 168, 190-91 (1881):

> " 'It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or National, are divided into the three grand departments of the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested

in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the power confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.'

"These principles ought not to be departed from in the judicial determinations of this court, and their enforcement is essential to the administration of the Government, as created and defined by the Constitution. The grant of authority to the Executive, as to other departments of the Government, ought not to be amplified by judicial decisions. The Constitution is the legitimate source of authority of all who exercise power under its sanction, and its provisions are equally binding upon every officer of the Government, from the highest to the lowest. It is one of the great functions of this court to keep, so far as judicial decisions can subserve that purpose, each branch of the Government within the sphere of its legitimate action, and to prevent encroachments of one branch upon the authority of another."

C. Necessity for a Clear Manifestation of Intent to Reserve Navigable Water

The settled policy of the United States to hold navigable streams within federal territories in trust for future states raises a presumption against a disposal of those waters by the United States, which must be overcome in each individual case by a clear manifestation of an intention on the part of the United States to dispose of the waters as claimed. *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926); *Shively* v. *Bowlby,* 152 U. S. 1, 49, 57, 58 (1894).

In *Holt State Bank*, holding that title to the lands underlying the navigable waters within the Red Lake Indian Reservation passed to the State of Minnesota upon its admission into the Union and had not been reserved by the Chippewas through a succession of treaties whereby they had ceded to the United States their aboriginal right of occupancy to surrounding lands, this Court enunciated the governing legal principles as follows:

> "But, as was pointed out in *Shively* v. *Bowlby*, pp. 49, 57-58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 270 U. S. at 55.

The Court considered the decisive question to be "whether the lands under the lake were disposed of by the United States before Minnesota became a state" and it answered this question in the negative on the basis of considerations stated as follows:

> "An affirmative disposal is not asserted, but only that the lake, and therefore the lands under it, was within the limits of the Red Lake Reservation when the State was admitted. The existence of the reservation is conceded, but that it operated as a disposal of lands underlying navigable waters within its limits is disputed. We are of opinion [*sic*] that the reservation was not intended to effect such a

disposal and that there was none. If the reservation operated as a disposal of the lands under a part of the navigable waters within its limits it equally worked a disposal of the lands under all. Besides Mud Lake, the reservation limits included Red Lake, having an area of 400 square miles, the greater part of the Lake of the Woods, having approximately the same area, and several navigable streams. The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. The last treaties preceding the admission of the State were concluded September 30, 1854, 10 Stat. 1109, and February 22, 1855, 10 Stat. 1165. There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 389. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State. Without doubt the Indians were to have access to the navigable waters and to be entitled to use them in accustomed ways; but these were common rights vouchsafed to all, whether white or Indian, by the early legislation reviewed in *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 287-289, and *Economy Light & Power Co.* v. *United States, supra,* pp. 118-120, and emphasized in the Enabling Act under which Minnesota was admitted as a State, c. 60, 11 Stat. 166, which declared that the rivers and waters bounding the State 'and the navigable waters leading into the

> same shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States.' " 270 U. S. at 57-59 (footnote omitted).

This is true where the claimed reservation of water is based upon an act of Congress. *A fortiori* it is true with respect to an alleged reservation of water by executive order, assuming for purposes of argument that the power to reserve water can be, or in the particular case has been, delegated to the Executive by Congress.

In determining whether rights in navigable waters have been reserved for the benent of Indian Reservations, this Court has distinguished between cases in which the Reservation consists of lands remaining as a residue after treaty cessions of tribal lands held in aboriginal possession and cases in which an Indian Reservation is created out of public lands of the United States set apart for occupancy as a Reservation.

For example, in *United States* v. *Winans,* 198 U. S. 371 (1905), the Court upheld rights of the Yakima Indians to take fish from a navigable stream where their fishing rights had been reserved in a treaty which granted to the United States lands held in aboriginal possession. Significantly, the Court regarded the "pivot of the controversy" to be the construction of the treaty. It found that the treaty was not a grant to the Indians but a reservation by them of rights already possessed and that the rights so reserved imposed a servitude on the land ceded to the United States by the treaty.

The Indian Reservations here involved are not treaty Reservations. All of them consist of lands set apart from the public domain for Indian occupancy by congressional act or executive order.

Moreover, it is much more difficult to find an intention to reserve the right physically to withdraw and consume the water of a navigable stream or to alienate title to the bed thereof than it is to find a reservation of rights, such as the right to fish, the exercise of which does not involve any withdrawal or consumption of the water itself. Compare for example, *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 79 (1918), which held that Congress in setting apart by statute the "body of lands known as Annette Islands" intended to reserve fishing rights in the offshore waters, with *United States* v. *Holt State Bank*, 270 U. S. 49 (1926), in which a reservation of land by Indian treaty was held not to have reserved navigable water for use on the land reserved.

D. Lack of Evidence of an Intent to Reserve Water for Indian Reservations

There is no evidence in the case at bar sufficient to warrant the finding that the United States in establishing the Colorado River and Fort Mohave Indian Reservations intended to reserve water of the Colorado River for the use of those Reservations (A Exc. 10, 19, 21).[63] Indeed the evidence is to the contrary.

(1) Colorado River Indian Reservation

On March 3, 1865, Congress established the Colorado River Indian Reservation by a statute which described the lands withdrawn for Reservation purposes as follows:

[63] Since the Cocopah Reservation was created by executive order after Arizona had been admitted to statehood, its establishment was ineffective to reserve water of the Colorado River for use on the Reservation (pp. 121-24, *supra*). In all events, the executive order creating the reservation (U. S. 1001) contains no mention of water, nor any expression of an intent to reserve water for the Reservation. Nor does the record contain any evidence of the circumstances surrounding the creation of the Reservation from which an intent to reserve water may be inferred.

> "All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries."[64]

Thus, the statute does not even mention water of the Colorado River much less make any reservation of that water.

On November 22, 1873, President Grant issued an executive order directing that there be withdrawn from sale and added to the Colorado River Indian Reservation

> "all that section of bottom land adjoining the Colorado Reserve, and extending from that Reserve on the north side to within 6 miles of Ehrenberg on the south, bounded on the west by the Colorado River, and east by mountains and mesas." (US 503)[65]

Here again no water of the Colorado River was set apart for use on the Reservation.

An executive order of November 16, 1874 further enlarged the Reservation by extending it into the state of California and described the tract as "embraced within the following . . . boundaries":

> "Beginning at a point where the La Paz Arroyo enters the Colorado River, 4 miles above Ehrenberg thence easterly with said arroyo to a point south of the crest of La Paz Mountain; thence with said crest of mountain in a northerly direction to the top of Black Mountain; thence in a northwesterly direction

[64] 13 Stat. 559.

[65] All of the executive orders relating to Indian Reservations have been collected and published by the Department of the Interior in two volumes entitled "Executive Orders Relating to Indian Reservations", the first volume including those orders issued up to 1912 and the second volume those issued between 1912 and 1922.

> across the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a southeasterly direction to the point of beginning, be, and the same is hereby, withdrawn from sale and set apart as the reservation for the Indians of the Colorado River and its tributaries." (US 504)

Once again the executive order made no mention of water of the Colorado River.

On January 31, 1876, the United States Indian Agent reported to the Commissioner of Indian Affairs that the boundaries as defined by the executive order of 1874 crossed the Colorado River twice and cut off a large tract of land on the east side of the river which was being settled by non-Indians for unlawful and improper purposes. The Agent requested that an executive order be obtained "making the ~~Colorado~~ River the boundary line". The Commissioner of Indian Affairs and the Secretary of the Interior approved the recommendations (US 505A, 505B, 505C). Thereafter on May 15, 1876, an executive order issued which re-defined the boundaries of the Reservation and contained the following description of the western boundary:

> ". . . thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning." (US 505)

Thus, neither the Act of Congress which created this Reservation nor the executive orders which enlarged it contain any express manifestation of an intent to reserve

water of the Colorado River for use on the Reservation. By their terms, they deal only with a withdrawal of lands from the public domain. No mention of water is made. It was undoubtedly contemplated that the United States might acquire for the benefit of the Indians a right to water by actual use, but there is no basis whatever for inferring an intent to reserve any water from the Colorado River for the Reservation or to reserve such water in an amount sufficient to irrigate all of the irrigable acreage in the Reservation.

To the contrary, as the legislation enacted by Congress following the establishment of the Colorado River Indian Reservation clearly demonstrates, Congress did not consider that there had been a withdrawal of water for that Reservation either by the statute creating the Reservation or by its subsequent enlargement by executive order.

Section 25 of the Act of April 21, 1904,[66] provides in part:

> "That in carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation Act . . . and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain."

In *United States* v. *Arizona*, 295 U. S. 174, 185 (1935), this Court construed the quoted language thus:

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[66] 33 Stat. 224.

> "The purpose was not to prescribe or regulate the means to be employed to divert water from the Colorado but to extend the reclamation law to the Indian reservations named. It was merely to empower the Secretary, if the circumstances stated should arise, to reclaim lands in these reservations by use of water to be taken from that river. The authority granted was no more than permission to appropriate them for the purpose specified."

This declared intention "to extend the reclamation law" to the Colorado River Indian Reservation is clearly inconsistent with the Master's conclusion that, long prior to the statute, sufficient water from the Colorado River had been reserved to irrigate all the irrigable acreage within the Reservation.

Section 8 of the Reclamation Act[67] provides in part:

> "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

It is inconceivable that Congress would have thus required the Secretary to acquire water rights for this Reservation by appropriation under state law if it had thought that a reserved water right with a priority date of 1865 already existed for these lands.

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[67] 32 Stat. 390 (1902), 43 U. S. C. §383 (1958).

Section 8 of the Reclamation Act also prescribes that "beneficial use shall be the basis, the measure, and the limit of the right".[68] This requirement cannot be reconciled with the concept that a water right may be acquired by reservation without any physical application of water to a beneficial use.

Moreover, later congressional enactments demonstrate even more plainly that Congress itself did not believe that the mere creation or enlargement of the Reservation had set apart water of the Colorado River for use on the Colorado River Indian Reservation.

Congress, in the Act of April 4, 1910,[69] appropriated $50,000

> "For the construction of a pumping plant to be used for irrigation purposes on the Colorado River Reservation, together with the necessary canals and laterals, for the utilization of water in connection therewith, *for the purposes of securing an appropriation of water* for the irrigation of approximately one hundred fifty thousand acres of land . . . to be reimbursed from the sale of the surplus lands of the reservation."

This specific grant of funds to enable the Secretary to make an appropriation of water for use in the Reservation is irreconcilable with the view that, by the very creation of the Reservation, water had been reserved for use upon it.

The Secretary of the Interior in 1910 was also of the view that there had been no automatic reservation of water of the Colorado River for use on the Reservation. In a communication dated February 24, 1910 to the Chairman of the Senate Committee on Indian Affairs, the Secretary

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[68] 32 Stat. 390 (1902), 43 U. S. C. §372 (1958).

[69] 36 Stat. 273.

recommended passage of what became the Act of April 4, 1910, referred to the proposed treaty between the United States and Mexico regarding a division of the water of the Colorado River, and stated that it had been tentatively agreed between the representatives of the respective governments:

> "That each country will recognize all water rights in the Colorado River which have been initiated prior to the final adjustment of the contemplated treaty, providing such rights have been acquired through actual construction or beneficial use. That afterwards all irrigation carried out which has not initiated a right must share equally on a proportionate acreage basis in the cost of the necessary storage reservoirs."[70]

The Secretary continued:

> "If no irrigation project is entered upon by this Government, it is not at all improbable that this great area of rich, irrigable land, approximating 150,000 acres, will be deprived of a water supply, unless the construction of extensive storage reservoirs is undertaken. Even eliminating Mexico from consideration, filings are being made by citizens and corporations upon the waters of this river, and if rights are to be initiated for these Indians' lands, the work should be started at an early date, with a view to making a proper appropriation. The department is aware, and the subject has been brought to the attention of Congress, as is evidenced by the language of section 25 of the act of April 21, 1904 (33 Stat. L., 224), that a reclamation project was contemplated on the Colorado River Reservation under similar provisions to the one now under way at Yuma, Ariz. The depleted state of the reclamation fund

[70] S. Rep. No. 357, 61st Cong., 2d Sess. 14 (1910).

has, however, prevented any action toward the carrying out of this project.

"It will be observed from the foregoing that the initiation of irrigation work at an early day on the Colorado River Indian Reservation is of the highest importance, and I recommend that there be included in the Indian appropriation bill an item carrying $50,000 for establishing an irrigation system on this reservation. If this amount, which should be reimbursable from the sale of the surplus lands of the reservation, should be made available, it would be possible to install a pumping plant and distributing system to irrigate approximately 3,000 acres. Such a system could be so constructed as to fit into and become a part of any larger gravity irrigation system which might be constructed at a later date. In this manner a just claim upon sufficient water to irrigate the 150,000 acres on the reservation can be established."[71]

This is persuasive evidence that Congress and the Secretary of the Interior both recognized that neither when the Colorado River Indian Reservation was established in 1865 nor at any time thereafter had there been any withdrawal of Colorado River water for use on the Reservation; and further, that rights to that water would necessarily have to be acquired, if at all, by actual appropriation and application to beneficial use within the Reservation.

Each year after the passage of the Act of April 4, 1910 through 1919, Congress in making appropriations for the Colorado River Indian Reservation made reference to the Act of April 4, 1910, and in each instance provided expressly that the work done was "for the purposes of securing an appropriation of water" for irrigation. Thereafter, in making each annual appropriation through 1942, the inten-

[71] *Id.* at 14.

tion to provide funds to make an appropriation of water was restated by referring to the Act of April 4, 1910 (US 507).

The fact that each of these thirty-two annual appropriations of funds was, either expressly or by reference back to the Act of April 4, 1910, made "for the purpose of securing an appropriation of water" for irrigation is wholly inconsistent with the theory of the Special Master that by the establishment of the Colorado River Indian Reservation Congress intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 265), and that the President in enlarging the Reservation in 1873 and 1874 had a similar intention.

Following the enactment of a rivers and harbors improvement act in 1935,[72] Congress made a series of appropriations pursuant to §2 of the Act for, among other things, "construction, repair, and rehabilitation of irrigation systems on Indian reservations" and "*for the purchase of water rights,* ditches, and lands needed for such projects; and for drainage and protection of irrigable lands from damage by floods or *loss of water rights.*"[73] This legislation covers the period 1935 through 1949 (U. S. 507). Each act makes an appropriation specifically for the Colorado River Indian Reservation.

These statutes, which repeatedly appropriated funds for "purchase of water rights" and for "protection of irrigable lands from . . . loss of water rights", are contradictory of

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[72] Act of August 30, 1935, 49 Stat. 1028.

[73] 50 Stat. 579 (1937); 52 Stat. 307 (1938); 53 Stat. 702 (1939); 54 Stat. 422 (1940); 55 Stat. 319 (1941); 56 Stat. 517 (1942); 60 Stat. 356 (1946); 61 Stat. 467 (1947); 62 Stat. 1119 (1948); 63 Stat. 772 (1949).

the Master's theory that, upon the establishment of the Colorado River Indian Reservation in 1865 and upon its enlargement in 1873 and 1874, there was automatically reserved for its benefit all the water of the Colorado River which might ever be needed to irrigate all the irrigable acreage within the Reservation.

(2) Fort Mohave Indian Reservation

The area which is now referred to as the Fort Mohave Indian Reservation was originally set aside as a military reserve (US 1301).

In 1890, this military post was transferred to the Department of the Interior for Indian school purposes (US 1303) pursuant to the Act of July 31, 1882,[74] entitled "An Act to provide additional industrial training schools for Indian youth, and authorizing the use of unoccupied military barracks for such purpose." This Act provided:

> "That the Secretary of War be, and he is hereby, authorized to set aside, for use in the establishment of normal and industrial training-schools for Indian youth from the nomadic tribes having educational treaty claims upon the United States, any vacant posts or barracks, so long as they may not be required for military occupation, and to detail one or more officers of the Army for duty in connection with Indian education, under the direction of the Secretary of the Interior, at each such school so established: *Provided,* That money appropriated or to be appropriated for general purposes of education among the Indians may be expended, under the direction of the Secretary of the Interior, for the education of Indian youth at such posts, institutions, and schools as he may consider advantageous, or as

[74] 22 Stat. 181.

> Congress from time to time may authorize and provide."

The stated purpose of this transfer to the Department of the Interior was to permit the use of the military post and barracks for an industrial training school for Indian youth. The transfer did not by its terms even create an Indian "Reservation" and certainly cannot support a finding of an intent to withdraw water from the Colorado River for Reservation uses.

The first mention of a "Fort Mojave Indian Reservation" to be found in the record appears in an executive order dated December 1, 1910 (US 1304), which was superseded by the executive order of February 2, 1911 (US 1305), withdrawing additional lands and setting them apart

> " . . . as an addition to the present Fort Mojave Indian Reservation, in Arizona, for the use and occupation of the Fort Mojave and such other Indians as the Secretary of the Interior may see fit to settle thereon. . . ."

Neither of these two orders made any mention of water.

The executive order of February 2, 1911 set aside about 18,000 acres of bottom lands embraced in the even-numbered sections in the Mohave Valley. The odd-numbered sections in the area had already been granted to the Atlantic & Pacific Railroad (now the Santa Fe Railroad) which had in 1904 sold this land to the Rio Colorado Land & Irrigation Company (US 1315, Hist. of Reservation, p. 1). In 1910, the Cotton Land Company bought these odd-numbered sections from the Rio Colorado Land & Irrigation Company (US 1315, Hist. of Reservation, p. 3). As a result, alternate sections in the Mohave Valley were privately owned at the time the executive order was issued in 1911, so that land

ownership in the area was complicated by a checkerboard pattern.

In 1910, the Chief Engineer of the Indian Irrigation Service recommended the adoption of an agreement whereby the Cotton Land Company proposed to sell water rights to the Indian lands at $25 per acre (US 1315, Hist. of Reservation, p. 3; US 1316, p. 3). Obviously, he would not have made such a recommendation had he believed that the Indians were already the owners of more than sufficient water to meet all of their Reservation needs.

We find nothing in the foregoing acts of the United States in creating and enlarging the Fort Mohave Indian Reservation which gives any indication of the existence of an intent to reserve water of the Colorado River for use on that Reservation. To the contrary, the conduct of the United States negatives such an intent.

(3) Additional Considerations Applicable to Both Reservations

There is other evidence that Congress did not consider that the activities of the United States in withdrawing land from the public domain for use as an Indian Reservation operated also to reserve water for use on the Reservation. In acts specifically dealing with rights to use water on certain Indian Reservations Congress has specified that such rights should depend on appropriation under state law.[75]

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[75] For example, the Act of May 30, 1908, §2, 35 Stat. 558, 560, dealing with the Fort Peck Indian Reservation, provides: "All appropriations of the waters of the reservation shall be made under the provisions of the laws of the State of Montana." See also the Act of March 1, 1907, 34 Stat. 1035 (Blackfeet Indian Reservation); Act of June 21, 1906, 34 Stat. 375 (lands of Uncompahgre, Uintahs and White River Utes); and Act of March 3, 1905, 33 Stat. 1020 (lands of Shoshone Indians).

The fact that, when the attention of Congress was focused on the matter of the right to use water on an Indian Reservation, it provided that such rights be acquired under state law runs completely counter to the existence of an intent to secure such water rights by reserving or withdrawing water for use on Indian Reservations.

There is an additional reason for believing that the Master's theory is unsound. At the time the Colorado River Indian Reservation was created and enlarged, California had already attained statehood. It follows that any reservation of water that could be implied from the withdrawal of land for purposes of the Reservation would be ineffective as against California because, at the time the withdrawal of land was made, the United States was without power to reserve navigable water as against California (pp. 121-24, *supra*). To say that the United States intended to reserve water flowing in the Colorado River within the Territory of Arizona, when it was powerless to reserve the water of the same stream flowing in the State of California, is to impute to the United States the intent to deny the future State of Arizona the same sovereign rights then enjoyed by California. That the United States intended so to "contract the sovereignty" of Arizona prior to its admission into the Union, when the State of California on the opposite side of the stream was already in possession of full sovereign rights as to its part of that stream, is not to be implied in the absence of compelling evidence.

As was stated in *United States* v. *Texas*, 339 U. S. 707, 720 (1950):

> "For equality of States means that they are not 'less or greater, or different in dignity or power.' See *Coyle* v. *Smith*, 221 US 559, 566."

It may not be rightly assumed that the national government intended to confine Arizona to a sovereignty with respect to its navigable waters which, in dignity or power, is less than that of its sister state across the river.

At the time of the creation of the Fort Mohave Indian Reservation, California and Nevada had both been admitted to statehood. Therefore, the same considerations which mitigate against a reservation of water for the Colorado River Indian Reservation are equally applicable to the Fort Mohave Indian Reservation.

The Special Master's Report gives no recognition to any of the foregoing matters which negative the existence of an intent to reserve Colorado River water for the Colorado River and Fort Mohave Indian Reservations. Instead he finds "that the United States intended to reserve mainstream water for the reasonable future needs of the . . . Reservations" upon the grounds that "it was intended that the Indians would settle on the Reservation land and develop an agricultural economy", that the land "is too arid to support such an economy without irrigation from the Colorado River", and that it "would be unconscionable for the United States to have coerced or induced Indians onto a Reservation without providing the water necessary to make the lands habitable" (Rep. 259-60).

The Master's view that if the Indians "were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun" (Rep. 261) is unrealistic, to say the least.

When the Colorado River Indian Reservation was created by Congress in 1865 the vast water resources of the Colorado River were virtually untouched. The entire Colorado River basin was frontier area, sparsely settled and almost entirely undeveloped. Demands against the water

of the Colorado River were small and unimportant, as there was little irrigation practiced in the Lower Basin, no large centers of population were in existence to require water for municipal, industrial and domestic purposes and the diversion and use of large quantities of water by multi-purpose projects was not even thought of. Most of the millions of acre-feet of water which drained into the Colorado flowed practically unused to the Gulf of Mexico, and it was not contemplated or even imagined that the resources of the River would ever be inadequate to meet all foreseeable needs, both Indian and non-Indian. While it was undoubtedly assumed that the Indians of the Colorado River Indian Reservation would use some water of the river for agricultural and other purposes, the water flowing by the Reservation and there for the taking exceeded by far all anticipated requirements. The problem confronting the United States as guardian of the Indians on the Colorado River Indian Reservation was not how to compete successfully with others for a share in a limited water supply, but how best to divert and utilize a bountiful water resource, more than ample for all the Indians' needs.

Under these circumstances, there was no occasion to reserve any water for the protection of the Indians resident upon the Reservation, nor was there any thought that they would be "thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use" (Rep. 261).

What has just been said regarding the Colorado River Indian Reservation applies with equal force to the Fort Mohave Indian Reservation.

E. Indian Needs, Rather Than Irrigable Acreage, the Correct Measure of Any Reserved Water Right

Arizona does not concede that water was reserved for use on the Reservations involved. However, in the event the Court should hold that there was such a reservation of water, the question will arise as to what amount was set apart.

The Special Master concludes that there was reserved "sufficient water to irrigate all of the practicably irrigable lands in a Reservation and to supply related stock and domestic uses" (Rep. 262).

It should be kept in mind that the water with which we are here concerned is not only a precious and limited natural resource, but one which cannot be preserved intact or stock-piled if not used. Advance planning and construction of dams and irrigation works to store and divert the water is necessary if it is to be put to maximum beneficial use, with the result that non-Indian users cannot take full advantage of the failure of Reservation Indians, as beneficiaries of prior reserved rights, to utilize the water reserved for them. Therefore, if water is set aside or reserved for purposes which do not result in its utilization, it runs unused to the sea or evaporates and is thus irretrievably lost. Accordingly, the Court will be most reluctant, we are sure, to adopt a concept of water rights, whether for Indians or non-Indians, which would involve the waste or non-use of this rare "treasure". *New Jersey* v. *New York*, 283 U. S. 336, 342 (1931).

The only justification for the concept that presently unused and unneeded quantities of water should be set aside to meet future needs of Indians is that this action

is necessary to afford a retarded class of citizens the equality of opportunity which would be denied to them if they were forced to compete with their more advanced neighbors. If it be acknowledged that this view is sufficient justification for conferring upon our Indian citizens special prerogatives in the use of water, then a proper regard for the rights and welfare of non-Indian citizens requires that these special privileges be granted the nation's Indian wards only when and to the extent that they are necessary for the Indians' protection and advancement.

Thus the yardstick for any reserved right to use water on Indian Reservations must be one which can be justified as setting aside for the Indians the amount of water required for their reasonable needs. We do not dispute the conclusion of the Master that the quantity reserved should be sufficient for reasonable future needs. We agree that uses or needs existing either now or at the time the Reservations were established are not the only measure of the amount reserved. We also concur that an open-end decree which would leave the reserved amount uncertain and subject to fluctuation is neither desirable nor necessary. However, we submit that an unsatisfactory and indeed extreme criterion should not be adopted simply because it permits of certainty and definiteness; and we assert that any measurement of the reserved quantity must be rejected unless it is demonstrably commensurate with the reasonably foreseeable needs of the Indians themselves. The irrigable acreage yardstick does not meet that test (A Exc. 11, 15-16, 19-22).

What constitutes irrigable land is itself a matter of uncertainty and is subject to frequent change, depending upon prevailing practices in evaluating the chemical composition of soils and their depth, texture, permeability,

slope, drainage, salinity, alkalinity, elevation and topography, as well as climatic conditions and a host of other factors.

For example, the soil survey made in 1940-1941 covering 115,900 acres of bottom lands in the Colorado River Indian Reservation within Arizona resulted in the conclusion that there were 68,432 irrigable acres within that portion of the Reservation (C 2619, p. 7). But the studies made by the Office of Indian Affairs in 1955-1956 for purposes of this litigation purport to show that there are 112,402 irrigable acres in the Arizona portion of the Colorado River Indian Reservation (US 560). Only some fifteen years separate these two studies, yet the earlier figure has been increased by approximately 68%.[76] The lesson of these figures is plain: The number of acres within an Indian Reservation regarded as irrigable depends on the date the question is decided.

Certainly at the time these Reservations were created and enlarged the number of irrigable acres within them was unknown. And it seems likely that other factors such as the availability of land owned by the United States in the vicinity where the Indian tribes traditionally lived, the location of natural monuments which would permit of reasonably accurate descriptions in these unsurveyed areas, the desirability of setting aside a contiguous area of land, as well as other considerations, played a part in the selection of the lands included within these Reservations.[77] But had the lands within the Reservations been selected on the basis of the amount of irrigable acreage included and with the

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[76] The 1955-1956 studies by the Office of Indian Affairs found 105,210 acres of bottom or valley lands and 7,192 acres of mesa lands on the Colorado River Indian Reservation suitable for irrigation. These figures are gross and were reduced by 12% for rights-of-way, farmsteads, etc., leaving a net of 92,859 acres of valley lands and 6,329 acres of mesa lands (Tr. 14267-8).

[77] U. S. 505-A.

intent of reserving sufficient water to irrigate all the irrigable land within the Reservations, it is undeniable that the quantity then considered irrigable would have been far less than the latest opinion of the experts in this field.

If the amount of irrigable lands is to be the sole measure of the quantity of water reserved for use on these Reservations, it is immaterial whether the water will ever be used by the Indians or even whether any Indians occupy the Reservation to make use of the water reserved.

That the amount of water reserved under the irrigable acreage formula has no relationship to the water required to meet the needs of the Indians is strikingly demonstrated by a consideration of the amount of water reserved per member of the different tribes of the five main stream Reservations by application of the Master's irrigable acreage standard:

Tribe	Tribal Population[78]	Maximum Diversion Per Year in Acre Feet[79]	Annual Diversion per Member of Tribe in Acre Feet
Ft. Mohave Indian Tribe.....	450	122,648	272.55
Cocopah Indian Tribe.....	90	2,744	30.49
Colorado River Indian Tribes	1,300	717,148	551.65
Quecham Indian Tribe (Yuma Res.)	1,200	51,616	40.01
Chemehuevi	300	11,340	37.80

These figures expose the fundamental weakness of the irrigable acreage formula—namely, it has no necessary relationship to the reasonable needs of the Indians for whose benefit the water is set apart. The formula denies non-Indian citizens the use of a precious resource without any assurance or likelihood that it will be used by the Indians.

As the basic authority for the adoption of the irrigable acreage standard, the Master relies primarily on this

[78] Rep. 85-88.

[79] Rep. 350-51.

Court's decision in *Winters* v. *United States,* 207 U. S. 564 (1908). However, neither that case nor the others cited by the Master held that the extent of a reserved water right is measured by the quantity of water necessary to irrigate all the irrigable acreage of a Reservation. The Master states that "the *Winters* case has been cited many times as establishing that the United States may, when it creates an Indian Reservation, reserve water for the future needs of that Reservation. . . ." (Rep. 258) He then concludes that the United States, in setting aside land as a reservation, must have intended that every irrigable acre would eventually be irrigated and therefore sufficient water was reserved for that purpose (Rep. 262). This conclusion is without precedent and, as will be demonstrated, leads to inequitable results when applied to the Indian Reservations with which we are concerned.

The Master rejects the reasonable needs of the Indians as the proper measure of the reserved right because of "the difficulty of predicting the future needs of Indian Reservations" (Rep. 264). He overlooks the fact that this "difficulty" has not prevented the use of this yardstick by the courts in the majority of the cases cited by him. Furthermore, as we have just seen, the standard of irrigable acreage is itself uncertain because of the ever changing concepts of irrigability.

The Court of Appeals in the *Winters* case[80] enjoined uses by non-Indians which would in any manner interfere with the use of 5,000 inches of water of the Milk River, a non-navigable stream, on the Fort Belknap Reservation in Montana. The decision states that there were about 30,000 acres of land within the Reservation susceptible of irrigation with the water of the Milk River but that:

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[80] 143 Fed. 740 (9th Cir. 1906).

> "... As alleged in the complaint, 'approximately 5,000 acres of land are being irrigated upon said reservation for the purpose of producing thereon crops of hay, grass, grain, and vegetables with the waters diverted by means of said canal and lateral ditches distributing said waters from said canal over the lands.' This canal has a carrying capacity of at least 5,000 inches of water, and such amount of water is required for the *present needs and requirements* of the government and the Indians, for household, domestic, agricultural, and irrigating purposes on said reserve." 143 Fed. at 741.

The Court of Appeals actually rejected the claim of the United States to all the water of the Milk River for the irrigation of all lands on the Reservation susceptible of cultivation and, instead of predicating the rights of the Indians on the amount of water required for the irrigation of the 30,000 acres of irrigable Reservation lands, limited their rights to the 5,000 inches required for the irrigation of the 5,000 acres then being irrigated and for domestic and stock-watering purposes.

The affirmance of that decision by this Court was in effect a rejection of the Government's claim to the quantity of water necessary for the irrigation of all irrigable lands and a clear recognition of the present needs of the Indians living on the Reservation as the governing criterion.[81]

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[81] This Court did not hold differently in *United States* v. *Powers*, 305 U. S. 527 (1939). All that was there decided was that the Secretary of the Interior could not completely exclude allottees of lands, within an Indian Reservation but outside the government irrigation project for that Reservation, from sharing in the use of whatever waters might have been reserved by the treaty creating the Reservation. No determination was made as to the extent of the allottees' share. See also the decision of the Court of Appeals in the same case, which disapproved the trial court's attempt to admeasure the shares of the allottees. 94 F. 2d 783, 786 (9th Cir. 1938).

The Special Master also cites *Conrad Inv. Co.* v. *United States,* 161 Fed. 829 (9th Cir. 1908). As we read that decision, it was actually based on the needs of the Indians. The United States there claimed all the waters of a non-navigable stream for use on all Reservation lands suitable for farming and ranching. Irrigable acreage within the Reservation totaled 10,000 acres. Stream flow varied from a minimum of 2,500 inches to a maximum of 150,000 inches. The trial court rejected the United States' claim to the entire flow of the stream, finding that:

> "[T]he testimony adduced does not bear them [the Government's allegations] out, and the question recurs whether the government is now entitled to the amount of water which it alleges *has been* diverted. I am of the opinion that it is so entitled." 156 Fed. 123, 130 (C. C. D. Mont. 1907).

Accordingly, a decree enjoining the defendant from making a diversion which would reduce the flow available to the United States below 1,666⅔ inches was entered by the trial court and affirmed on appeal.

The *Conrad* case therefore really involves a refusal to apply the irrigable acreage test to a determination of quantity because, had that test been applied, the United States would have been awarded at least 2,000 inches. While it is true that the trial judge found 1,666⅔ inches would have been sufficient for the irrigation of 10,000 acres, he also found that this quantity was sufficient for "the present *needs,* considering that much of the land will be irrigated for pasture only" and that the Government should "conserve the waters of such streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I may say, even possible future *needs*. . . ." 156 Fed. 123, 129, 130-31.

Since the Ninth Circuit Court of Appeals took into account the issue of quantity in affirming the decision for less than the amount requested by the United States, it tacitly endorsed the trial court's reliance on past actual use in determining quantity.

Nor does the decision of the Court of Appeals in *United States* v. *Ahtanum Irrigation Dist.*, 236 F. 2d 321 (9th Cir. 1956), *cert. denied*, 352 U. S. 988 (1957), apply the irrigable acreage test. The question there presented for decision was whether the United States was bound by an agreement entered into in 1908 between the Department of the Interior and certain non-Indians which gave the latter the right to divert and use water from Ahtanum Creek, a non-navigable stream, even though the United States contended that the agreement deprived the Indians of water needed on the Reservation. Since the Court of Appeals held that the agreement was binding, there was no occasion for it to consider the question of the measurement of a reserved water right.

Although the *Ahtanum* case did not present an issue as to quantity, since it was "conceded that the present needs of the Indians are sufficient to require substantially the whole flow of the stream", 236 F. 2d at 325, the court reviewed the previous decisions on the subject and concluded:

> "As we have said, the implied reservation of the waters of this stream extended to so much thereof as was required to provide for the *reasonable needs of the Indians*, not merely as those needs existed in 1908, but as they would be measured in 1915, when the Indian ditch system had been completed." 236 F. 2d at 337.

The court also said:

> "It is unnecessary to consider whether, had there been no 1908 agreement, the rights of the government as trustee for the Indians would have been constantly growing ones in the years following 1915 had the irrigable area within the reservation continued to increase. It is sufficient for the purposes of this case to say that an adjudication of the rights of the United States in and to the waters of Ahtanum Creek as of 1915, would necessarily award the United States a right measured by the needs of the Indian irrigation project at that date." 236 F. 2d at 328.

Thus, the *Ahtanum* case did not approve the irrigable acreage test used by the Special Master. Instead, it held that the extent of the reserved right was sufficient water for use on the Indian irrigation project, as it was developed in 1915, and declined to say whether this right would be enlarged by bringing additional land into the project.

The needs of the Indians, rather than a determination of the amount of water necessary to irrigate all the irrigable acres, was the test applied in *United States* v. *Walker River Irrigation Dist.*, 104 F. 2d 334 (9th Cir. 1939). There the United States sued to restrain the defendants "from interfering with the natural flow of the stream, to the extent of 150 cubic feet per second to and upon" the Reservation. As the Court of Appeals stated, "the tillable lands reserved have an area of approximately 10,000 acres". 104 F. 2d at 335. The court explicitly rejected irrigable acreage as the measure of the Indian needs, stating:

> "The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary

could be demonstrated only by experience." 104 F. 2d at 340.

The Court further found that water had been reserved "to the extent reasonably necessary to supply the *needs of the Indians*". 104 F. 2d at 339-40.

The "experience" which the court considered consisted of (1) cultivated acreage data showing an increase from 1,900 acres in cultivation in 1886 to about 2,000 acres when the suit was filed some 50 years later; and (2) statistics as to the Indian population of the Reservation and the number of Indians actually engaged in farming.

Based on this evidence, the report of the Master in that case, which was accepted by the Court of Appeals, concluded that "the number of Indians is not increasing and it has not been shown that there is the necessity or demand for the cultivation of a larger area than 2,100 acres". 104 F. 2d at 340. Relying on this finding, the court entered a decree awarding the Government 26.25 cubic feet per second during the 180-day irrigation season for the irrigation of 2,100 acres of land on the Reservation, together with the flow reasonably necessary for domestic and stock-watering purposes and for power purposes to the extent then used by the United States during the non-irrigating season. Thus, the court limited the Indians' water rights to their existing and reasonably foreseeable needs as shown by past experience and rejected the irrigable acreage test.

Before the Master here the Government cited *Skeem* v. *United States*, 273 Fed. 93 (9th Cir. 1921) as authority for its contention that, "when an Indian reservation is set apart, the water right thereby reserved is large enough to irrigate the entire irrigable acreage of the reservation". No such holding was made in that case.

In *Skeem*, the court was considering the effect of a Reservation created by an 1898 treaty, which provided:

> "The water from streams on that portion of the reservation now sold which is necessary for irrigating on land actually cultivated and in use shall be reserved for the Indians now using the same, so long as said Indians remain where they now live."[82]

The court rejected the contention that this limited the Indians to the quantity of water being used in 1898, since the grant was one *by* the Indians and not *to* the Indians, so that all rights not specifically granted were reserved by the Indians. The decision was not a determination by the court that a water right which has been reserved by implication is to be measured in terms of irrigable acreage. Rather, the court construed the treaty provision to mean that the Indians themselves were retaining a right to sufficient water to irrigate all the irrigable lands withheld by them. Hence, the case is not authority for the proposition that the extent of the rights of the Reservations here involved, which at most could only have come into being by implication, is to be determined by the irrigable acreage criterion.

In addition, the principal question before the court in *Skeem* was whether the leasing of his land by an Indian allottee operated to relinquish a reserved water right. The court held that it did not.

Thus, none of the cases cited by the Special Master holds that the setting aside of lands for an Indian Reservation in itself operates by implication to reserve water for every irrigable acre. In fact, the court in each instance rejected that test and held that the quantity of water reserved by implication was to be determined by the needs of the Indians.

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[82] 31 Stat. 672, 674 (1900).

In each case where the implied reservation theory has been applied, the court has determined the quantity of water reserved for the Indians on the basis of the particular facts and circumstances involved. In no case did the court use irrigable acreage as the criterion. Instead, the attempt has been made to determine the needs of the Indians and this has usually been done by looking to past experience as a guide.

In *Winters* the court awarded water for the irrigation of 5,000 out of 30,000 irrigable acres. In *Conrad* the court looked to present use and in the *Walker River* case the reasonable needs of the Indians as shown by past experience were adopted as the standard. In *Ahtanum* the extent of the reserved right was held to be sufficient water for the Indian irrigation project as it existed in 1915. In *Powers* quantity was not in issue and was not determined.

Undoubtedly, in a proper case, a court might conclude that to satisfy the needs of the Indians it is necessary to set aside water for all the irrigable acreage on the Reservation. Arizona takes this view with respect to the Cocopah Reservation (see p. 190, *infra*). Such a situation might also arise if there were a large number of Indians on a Reservation with limited irrigable acreage. But that certainly is not the case here, where there are only a few Indians who depend for a livelihood on the acreage of the Colorado River Indian Reservation and no Indians who occupy the Arizona portion of the Fort Mohave Indian Reservation.

The historical facts relating to these Reservations demonstrate the inequities which would result from the test applied by the Special Master and the necessity for taking the needs of the Indians as the measure of the quantity of water reserved.

(1) Fort Mohave Indian Reservation

The Special Master has found that there are 14,916 acres of irrigable land on the Fort Mohave Indian Reservation in Arizona which, together with related uses, have a maximum annual diversion requirement of 96,416 acre-feet (Rep. 281). He has concluded that the United States has the right to divert this quantity of water from the Colorado River for use on this land (Rep. 283). When considered in the light of the history of the Reservation, this conclusion cannot be supported.

The so called "Fort Mohave Indian Reservation" was originally created as a military post and later transferred to the Department of the Interior to be used as an industrial training school for Indian youth. Additional land was set aside for the Mohave Indians in 1911 (p. 149, *supra*). The United States, as will be demonstrated, has abandoned any plans to develop an irrigation project on this Reservation.

No land is being irrigated on the Reservation at the present time (US 1302; Tr. 14072) and the maximum ever irrigated successfully is 23 acres (US 1320; Tr. 14000-01). The Mohave Indians are obviously not interested in farming for a livelihood since they live off the Reservation in Needles, California, where most of them are employed by the Santa Fe Railroad (Tr. 13764, 13917, 14220-22). In fact, none of these Indians resides within the Arizona or California portions of the Reservation and only one Indian family lives in the Nevada section (Tr. 14101-02). Yet, the Special Master has held that the United States has the right to divert almost 100,000 acre-feet per annum out of Arizona's share of Colorado River water for use in an area where no Indians live and where no farming operations are carried on.

In addition, the record establishes that no major irrigation project has ever been contemplated for the Fort Mohave

Indian Reservation. To the contrary, it has long been recognized that any such project is impracticable.

In his 1903 Report the Commissioner of Indian Affairs noted that "evidently a number of years ago nearly all the Indians who are now at Needles lived upon the overflow lands between Fort Mohave and Needles, but a failure of the Colorado River to overflow for a succession of years forced these Indians to seek employment on the railroad and in the shops at Needles" (US 1310). In the same report the Commissioner stated that "the school has irrigated by means of centrifugal steam pump the same lands that have been under cultivation by the school for a number of years".

In the 1912 Annual Report of the Department of the Interior it was said regarding the Fort Mohave Reservation: "There are well known and much discussed obstacles to a successful irrigation system on the lands of this Reservation. These are probably not insurmountable, and it would be of great benefit to the Indians to know, as soon as possible, whether it is to be the policy of the Government to attempt to install this system, or to make other provision for them" (US 1311, p. 25).

The 1915 Report of the Department noted that "few improvements of a permanent character have been made and but little farming done" and that although a portion of the lowlands along the Colorado had been allotted to the Mohaves, many of the allotments had been entirely destroyed by the frequent changes in the main channel of the river (US 1313, p. 88). The Report expressed the view that the expense involved in making the necessary improvements "would not be justifiable", and that, in any event, "representations have been made with a view to the removal of these Indians, or at least having them take allotments on lands not subject to overflow and which can be irrigated on the Colorado River Reservation, at Parker". The Report

added that this idea was being received favorably by some of the Indians, several of whom had gone to Parker, and added: "It seems best to encourage this irrigation and the surest way to do so will be to make no further attempt tc protect the lands at Fort Mohave, inasmuch as it has been fully demonstrated that this cannot be done with any assurance of permanence" (US 1313, p. 89).

The 1919 Report of the Department stated that 20 acres were then irrigated, that "the abandonment of this school has been contemplated, and until this matter is settled, no permanent irrigation work could well be undertaken" (US 1314).

As late as 1939, the Interior Department's Assistant Director of Irrigation reported to the Director, after reviewing the history of irrigation on the Fort Mohave Reservation, that:

> "There is no irrigation project on this reservation and prospects for developing a feasible project are not encouraging. . . ." (US 1315)

A so-called "Long Range Program" of irrigation for the Fort Mohave Reservation was referred to in a report to the Director of Irrigation dated January 29, 1944, which stated that as of that date "there is no irrigation project on this reservation. A small acreage near the school was irrigated by pumping for many years subsequent to 1891 until the school was abandoned." The report concluded:

> "Many of the Fort Mohave Indians have been allotted tentatively under the Colorado River Irrigation Project and under present conditions no plans are being considered for an irrigation project on the Fort Mohave Reservation. . . ." (US 1316)

Under § 4 of this same report there is this significant notation:

> "SECTION 4—SERVICES PROVIDED BY GOVERNMENT
>
> *Irrigation*
>
> None since early efforts to construct a small project."

In this history, covering a period of more than 70 years, we can find no justification for setting apart for the Fort Mohave Indian Reservation water of the Colorado River sufficient to irrigate 14,916 irrigable acres of Reservation land in Arizona or to meet an annual diversion requirement of 96,416 acre-feet, whichever is less (Rep. 281). To the contrary, we believe the entire history of irrigation on this Reservation evidences a purpose on the part of the United States *not* to irrigate this land on the ground that to attempt to do so would not be feasible. The Reservation was not originally established for agricultural purposes, but for use as a training school (pp. 148-49, *supra*). The school has long since been abandoned. The land set apart has never in any real sense been devoted to farming or related uses. Actually, the Mohaves themselves have abandoned the Reservation and no land is under cultivation.

For these reasons, the setting aside of such a substantial part of Arizona's share of Colorado River water for use on the Fort Mohave Indian Reservation can be of no benefit to the Indians. They are not farmers but live on wages from employment in Needles, California. None of them has shown a desire to live on the Reservation in Arizona or to engage in farming. To sustain the Master's holding would be to award a large quantity of water in perpetuity to this Reservation to the detriment of other areas in Arizona where additional water is so desperately needed (pp. 21-22, *supra*).

(2) Colorado River Indian Reservation

The Special Master has found that there are 99,375 acres of irrigable land in the Arizona section of the Colorado River Indian Reservation which, together with related uses, have a maximum annual diversion requirement of 662,402 acre-feet (Rep. 272). He has concluded that the United States has the right to divert that quantity of water from the Colorado River for use on the Reservation in Arizona (Rep. 273-74).

This conclusion is based upon the Master's holding that the United States, when it created this Reservation, had impliedly reserved sufficient water to irrigate all the irrigable acreage within the Reservation. As a result, there will be set apart from use by the general public a large quantity of water in perpetuity when no such amount has ever been used and in all likelihood never will be used on this Reservation. The facts make evident that the holding of the Master cannot benefit the Indians but will only result in depriving other areas in Arizona of water which is vital to the existing economy of the state.

The Colorado River Indian Reservation was created at the recommendation of the Commissioner of Indian Affairs to consolidate on one large Reservation a number of Indian tribes previously inhabiting numerous small Reservations scattered throughout the Southwest (US 512, p. 21). However, since the establishment of the Reservation in 1865, there has been only very limited success in relocating on it members of tribes which traditionally inhabited areas along the Colorado River.

The Yuma Indians never left their tribal home near Yuma, Arizona (US 526, p. 284; US 530). As a result, the Yuma Indian Reservation was established by executive order of January 9, 1884 for the Yumas and such other

Indians as the Secretary of the Interior might see fit to settle thereon (US 1101).

Of the estimated 2,000 Yavapais or Mohave-Apaches (US 521), only 17 were on the Colorado River Indian Reservation in July 1870 (US 522). None of these Indians was thereafter reported as being on this Reservation and they are now located on the Camp Verde Reservation, acquired through purchase by the United States, and on the Fort McDowell Indian Reservation, created by executive order on September 15, 1903 (US 2303).

Some members of the Chemehuevi tribe were living on the California portion of the Colorado River Indian Reservation in 1874 (US 530) but by 1890 all had returned to the Chemehuevi Valley about 30 miles north of the Reservation (US 539). A part of this valley was set aside as the Chemehuevi Indian Reservation by order of the Secretary of the Interior on February 2, 1907 (US 1201).

Similar attempts to locate the Hualapais on the Colorado River Indian Reservation also met with complete failure. In September 1867, 150 members of this tribe moved there but "... clandestinely left the reservation on the night of the 13th of March, and probably rejoined their former wild companions in the interior" (US 518, pp. 137-38). A report of the Commissioner of Indian Affairs indicates there were 620 Hualapais on the Reservation in 1874 (US 527, p. 61) but in 1875 "... they went off the reservation to their old range, saying they would not work or return to the reservation ..." (US 530) and they never returned (US 539). A separate reservation was created for this tribe by executive order on January 8, 1883 (US 801). See *United States* v. *Santa Fe Pacific R. R.*, 314 U. S. 339 (1941).

The resettlement of the Mohave Indians on the Colorado River Indian Reservation has been somewhat less unsuccessful. By 1867, approximately 750 of an estimated

4,000 members of this tribe had moved to the Colorado River Indian Reservation (US 516, p. 156) and in 1868 the number had increased to 2,000 (US 518, p. 137). However, only about 800 Mohaves were still there in 1869 (US 520, p. 205), 695 in 1870 (US 522, p. 116) and 830 in 1874 (US 527, p. 61). By 1890, the number of Mohaves living on the Reservation had dwindled to 640, while there were 667 at Needles and 410 at Fort Mohave (US 539, p. 2).

The Indian Agent at the Colorado River Agency reported in 1898 that "of the five tribes originally allotted to this reservation only one section of the Mohave tribe have ever been induced to locate permanently upon it. These number 683; of the remaining Mohaves, nearly all live from 80 to 125 miles above the reservation in the vicinity of Needles, Cal., and Fort Mohave, Ariz." (US 543, p. 111)

The effect of the failure of this resettlement program was before the Court in *United States* v. *Santa Fe Pacific R. R., supra,* where the history and purpose of the Act of March 3, 1865,[83] which created the Colorado River Reservation "for the Indians of said river and its tributaries", was reviewed and the intent of Congress in creating the Reservation was stated. The Court held that the Indians referred to in the Act included the Hualapais, 314 U. S. at 351 and said:

> "We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais [Hualapais], which it was hoped would be accepted as a compromise of a troublesome question." 314 U. S. at 353.

[83] 13 Stat. 559.

The Court continued:

> "Furthermore, the Walapais did not accept the offer which Congress had tendered. In 1874 they were, however, forcibly removed to the Colorado River reservation on order from the Indian Department. But they left it in a body the next year. And it was decided 'to allow them to remain in their old range during good behavior.' They did thereafter remain in their old country and engaged in no hostilities against the whites. No further attempt was made to force them onto the Colorado River reservation, even though Congress had made various appropriations to defray the costs of locating the Arizona Indians in permanent abodes . . . including the Colorado River reservation. . . . On these facts we conclude that the creation of the Colorado River reservation was, so far as the Walapais were concerned, nothing more than an abortive attempt to solve a perplexing problem." 314 U. S. at 354-55 (footnotes omitted).

The Court noted that in 1881 the Hualapais expressed a desire for the creation of a separate reservation for their benefit and that this was recommended by the Army, and said:

> "Pursuant to that recommendation, the military reservation was constituted on July 8, 1881, subject to the approval of the President. The Executive Order creating the Walapai Indian Reservation was signed by President Arthur on January 4, 1883. There was an indication that the Indians were satisfied with the proposed reservation. A few of them thereafter lived on the reservation; many of them did not. While suggestions recurred for the creation of a new and different reservation, this one was not abandoned. For a long time it remained unsurveyed. Cattlemen used it for grazing and for some years the Walapais

> received little benefit from it. But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by 'voluntary cession' within the meaning of §2 of the Act of July 27, 1886." 314 U. S. at 357-58 (footnotes omitted).

Thus the Court has expressly held that as far as the Hualapai Indians are concerned the creation of the Colorado River Reservation failed to accomplish its purpose and was no "more than an abortive attempt to solve a perplexing problem".

It is doubtful that, in the creation of the Colorado River Indian Reservation, Congress intended that it should serve as the home for any Indians except the five tribes: the Hualapais, Yumas, Yavapais, Chemehuevis and the Mohaves (see p. 111, *supra*). These Indians (with the exception of about one-third of the Mohave tribe) refused to live on the Colorado River Indian Reservation and ultimately other Reservations were created elsewhere for their benefit.

From time to time the United States created other and separate Reservations for the use and benefit of other Indian tribes in Arizona, as follows:

Gila River	Act of Congress	February 28, 1859	(US 1801)
Navajo	Treaty	June 1, 1868	(US 201)
Fort Apache	Executive Order	November 9, 1871	(US 2401)
San Carlos	Executive Order	November 9, 1871	(US 2001)
San Xavier	Executive Order	July 1, 1874	(US 1701)
Salt River	Executive Order	January 10, 1879	(US 2102)
Havasupai	Executive Order	June 8, 1880	(US 701)
Gila Bend	Executive Order	December 12, 1882	(US 1401)
Hopi	Executive Order	December 16, 1882	(US 401)
Kaibab	Executive Order	October 16, 1906	(US 602)
Papago	Executive Order	May 28, 1912	(US 1501)
Ak Chin	Executive Order	May 28, 1912	(US 1501)
Cocopah	Executive Order	September 27, 1917	(US 1001)

It would not be reasonable to conclude that each of these many Indian tribes is entitled to the benefit of water in two places, *i.e.*, the Reservation of their choice and the Colorado River Indian Reservation where they have refused to live. Instead of the more than 10,000 Indians contemplated by Congress in 1865, by 1900 less than 700 had elected to make this Reservation their permanent home. The record indicates that approximately 1,100 Indians reside on this Reservation at the present time (Rep. 86; C 2606). We cannot find any basis for concluding that there is a right to irrigate lands in the Colorado River Indian Reservation for Indians and Indian tribes who for more than ninety years have successfully resisted all efforts to move them there.

More than fifty years ago Congress itself recognized that attempts to colonize the Colorado River Indian Reservation had failed and that the area originally set aside for the Indians was excessive. By Act of April 21, 1904,[84] the Secretary of the Interior was authorized to include the Yuma and Colorado River Indian Reservations in any reclamation project which might make possible the reclamation of the Indian lands:

> "... *Provided,* That there shall be reserved for and allotted to each of the Indians belonging on the said reservations five acres of the irrigable lands. *The remainder of the lands irrigable in said reservations shall be disposed of to settlers under the provisions of the reclamation Act. . . .*"

The Act of March 3, 1911,[85] increased the allotment to ten acres of irrigable land per Indian but again provided that the surplus lands should be sold to pay the cost of irrigating the allotted lands.

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[84] 33 Stat. 224.

[85] 36 Stat. 1063.

The 1912 annual report of the U. S. Indian Irrigation Service (US 547, p. 7) stated that "there will be about 500 allotments of ten acres each or about 5,000 acres to be irrigated in this project . . ." This in effect was an administrative finding that no more than 500 Indians resided on the Reservation at that time.

The fact that Congress, in the Act of April 21, 1904, the Act of April 4, 1910, the Act of March 3, 1911 and appropriation acts from 1910 through 1942 (pp. 142, 144-47, 175, *supra*), provided that the funds expended should be reimbursable from the sale of surplus lands of the Reservation, plainly indicates that Congress recognized that most of the Indians for whom the Reservation had been originally created or thereafter enlarged had rejected the congressional offer of that Reservation as a tribal home and that therefore lands above the needs of the Indians resident on the Reservation were surplus and should be sold.

The Government contended before the Master that, by the Navajo-Hopi Rehabilitation Act of April 19, 1950,[86] Congress has "reaffirmed" its intent expressed in the Act of March 3, 1865 to maintain the Colorado River Indian Reservation for the use of Indians of the Colorado River and its tributaries.

The record supports the conclusion that neither the Navajos nor the Hopis were among the tribes for which the Reservation was created (1 p. 110-11, *supra*). Of course, the Navajo-Hopi Rehabilitation Act of April 19, 1950 could not "reaffirm" a congressional intent which never existed.

In any event, the rehabilitation program authorized by the Act has now expired. Section 2 of the Act provides:

> "The foregoing program . . . shall be prosecuted in a manner which will provide for completion of the

[86] 64 Stat. 44, 25 U. S. C. §§631-40 (1958).

program, so far as practicable, within ten years from April 19, 1950."[87]

Even prior to the expiration of the authority conferred by the Act, the project of relocating members of the Navajo and Hopi tribes on the Colorado River Indian Reservation had failed. No Navajos or Hopis were settled on this Reservation after 1957.[88]

From 1945 to 1958 a total of 149 Navajo, Hopi and Supai families were relocated on the Colorado River Indian Reservation. By June 30, 1958, only 67 of these families remained.[89]

Although Congress authorized the expenditure of $5,750,000 for the resettlement program,[90] by 1956 only $2,939,750 had been appropriated for this purpose and after 1956 no further funds were appropriated for resettlement of these Indians on the Reservation.[91]

Among the reasons which have been assigned for the failure of this resettlement project are both domestic and health problems, as well as inability to adjust to high summer temperatures and the agricultural techniques and managerial requirements necessary for successful irrigation farming.[92]

In addition, by the Navajo Treaty of 1868 [93] the Navajos agreed not to leave their Reservation under penalty of forfeiture of all rights, privileges and annuities conferred by the treaty.

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[87] 64 Stat. 45 (1950), 25 U. S. C. §632 (1958).

[88] Navajo Yearbook, 1958 (Report No. VII) p. 89; Navajo Yearbook, 1957 (Report No. VI) p. 80.

[89] Navajo Yearbook, 1958 (Report No. VII) p. 89.

[90] 64 Stat. 45 (1950), 25 U. S. C. §631(6) (1958).

[91] Navajo Yearbook, 1957 (Report No. VI) p. 79.

[92] Navajo Yearbook, 1958 (Report No. VII) pp. 89-90.

[93] 15 Stat. 667.

It was stated by Secretary of the Interior J. A. Krug in his report to Congress in connection with the Navajo-Hopi Rehabilitation Act:

> "Another reason why many of the Navajos do not wish to leave the reservation stems from Article 13 of the Treaty of 1868. . . . Aside from the ironical fact that this section of the treaty was designed to prevent the very thing—off-reservation movement which is now deemed essential, many of the Navajos believe that the tribe may in future realize substantial benefits from tribal assets, such as oil, coal, or helium, and they do not wish to relinquish their share of such future benefits or other rights, present or future, which they possess as members of the Navajo Tribe."[94]

That this reluctance is well-founded appears from the record (Tr. 13937):

> "The Navajo tribal income for the fiscal year 1955 was $4,215,264. For the fiscal year 1956, $3,988,570. For the fiscal year 1957, $36,951,185.
>
> "The Navajo treasury balance as of June 30, 1957, was $50,780,450.11. The Navajo tribal budget for the fiscal year 1958 was $12,301,231."

Recent public announcements indicate the surface has only been scratched and that the Navajos face a very bright future on their own Reservation. Unanticipated riches accruing to the Navajos from uranium, petroleum, and other minerals plus the industrial and general development of the Reservation has removed both the need and the incentive for resettlement on the Colorado River Indian Reservation.

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[94] Hearings Before a Subcommittee of the Senate Committee on Interior and Insular Affairs on S. 2363, 80th Cong., 2d Sess. 499 (1948).

The conclusion is warranted that there is neither equity nor reason in the proposal that the 107,588 irrigable acres of the Colorado River Indian Reservation be developed and supplied with irrigation water as a windfall for the benefit of the relatively few Indians who have made this Reservation their home.

It is impossible to ascertain from the record just how many Indians actually are living on the Reservation. Responsible government officials who should know were, to say the least, indefinite in their testimony. California Exhibit 2600-7, prepared by the United States but placed in evidence by California, does not deal with Indians actually resident on the Reservation. It is difficult to understand why the Government measured each "irrigable" acre of every Reservation with meticulous care, painstakingly surveyed the soil types and compiled a great mass of engineering data as to irrigability of land, and yet wholly neglected the most important fact—the number of Indians resident on the Reservation who are dependent upon farming of Reservation land for their livelihood. However, the Master estimated that 1,100 or 1,200 of the 1957 tribal population of approximately 1,300 live on the Reservation (Rep. 86).[95]

The evidence shows that in 1949, there were 22,315 acres in cultivation on the Colorado River Indian Reservation and in 1954 a maximum of 29,957 acres (US 575). During 1955, the last year for which there is any evidence, there were 29,271 acres in cultivation (US 575) out of a total of 107,588 acres found by the Master to be irrigable (Rep. 272).

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[95] The Master's estimate is substantially in agreement with population figures issued by the Department of the Interior late in 1960. Department of the Interior, United States Indian Population and Land 6 (1960).

In recent years the acreage actually farmed by the Indians has decreased. In 1953 the Indians farmed 18,719 acres, whereas 10,815 acres were farmed by non-Indian lessees and others (US 556, p. 7). In 1954, there were 15,153 acres farmed by the Indians and 14,804 acres by non-Indian lessees and others (US 556, p. 4). In 1955, the Indians farmed less than half the land cultivated on the Reservation. The acreage farmed by them in that year was 14,512 acres as compared to 14,759 acres farmed by non-Indian lessees and others (US 556, p. 1). In like manner, the number of Indians actively farming land on the Reservation has dropped from a maximum of 276 in 1951 to 148 in 1957, the last year of record (C. 2642). If this trend continues, the Indians will soon have the status of absentee landlords, a situation which was not contemplated by Congress when it created the Reservation nor when it appropriated funds to enable the Indians to make a livelihood by farming Reservation lands.

Presently irrigated acreage is sufficient for more than a 100% increase of use by the Indians farming on the Reservation. More than adequate provision has now been made for Indians living on this Reservation. With approximately 80% of the lands in Arizona in public ownership and hence non-taxable, she strenuously objects to diverting, for a non-taxpaying economy, water urgently needed to support the portion of her economy which is taxpaying.

One government witness testified that there are 40,000 acres ready for cultivation on the Colorado River Indian Reservation and that practically all of this land had been farmed at one time or another (Tr. 14098-99). This is substantially more than two and one-half times the 14,500 acres presently farmed by the Indians and therefore allows more than 25,000 acres for any future increase in need.

We suggest that allowance of a sufficient water supply to irrigate and farm this 40,000 acres would be more than adequate to provide for the present and reasonably foreseeable future needs of the Indians of this Reservation.

VI

Should the Court find there was no reservation of water for use on Indian Reservations, or, should the Court find such a reservation of water but reject Indian needs as the test of the quantity reserved, the amount of water to which the Reservations are entitled should be determined in accordance with principles of equitable apportionment.

If the Court should agree with our position, set forth earlier (pp. 121-53, *supra*), that the acts creating and enlarging the various Reservations were ineffective to reserve Colorado River water as well as land, we suggest that the extent of present day Reservation water rights should be determined by the application of principles of equitable apportionment akin to those used by this Court in resolving interstate water rights controversies.

Even if the Court should find that the acts creating and enlarging the Indian Reservations here in question were effective to reserve sufficient water to irrigate all the irrigable acreage in the Reservations, we again urge that the measure of the Reservation rights to water as against the rights of other users in Arizona be determined by application of principles of equitable apportionment.

Understandably, Arizona is reluctant to take a position adverse to any of her citizens. But since the Recommended Decree apportions to the Indians amounts of water far in excess of their needs, present and prospective, we

must urge the Court to modify this portion of it. We do not believe any class of citizens should be so favored at the expense of the other citizens of the state. Further, we believe that a commodity as precious to our area as water should be put to its most economical and efficient use, having equal regard for the rights and needs of all.

A. Status of Indian Tribes as Quasi-Sovereigns

Although the Indian tribes or "nations" are not sovereign in the sense that the several states are sovereign, *Cherokee Nation* v. *Southern Kansas Ry.*, 135 U. S. 641 (1890), nevertheless "in the executive, legislative and judicial branches of our government we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state or separate community". *Worcester* v. *Georgia,* 31 U. S. (6 Pet.) 515, 583 (1832) (concurring opinion).

This Court has also considered Indian tribes as states in a certain sense. In *Holden* v. *Joy,* 84 U. S. (17 Wall.) 211, 242 (1872) it was said:

> "Indian tribes are states in a certain sense, though not foreign states, or states of the United States, within the meaning of the second section of the third article of the Constitution, which extends the judicial power to controversies between two or more states, between a state and citizens of another state, between citizens of different states, and between a state or the citizens thereof and foreign states, citizens or subjects. They are not states within the meaning of any one of those clauses of the Constitution, and yet in a certain domestic sense and for certain municipal purposes, they are states, and have been uniformly so treated since the settlement of our country and

> throughout its history, and numerous treaties made with them recognize them as a people capable of maintaining the relations of peace and war, of being responsible, in their political character, for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted by Congress in the spirit of those treaties, and the acts of our government, both in the executive and legislative departments, plainly recognize such tribes or nations as states; and the courts of the United States are bound by those acts."

The latest pronouncement by the Court with respect to the status of Indian tribes was made in *Williams* v. *Lee*, 358 U. S. 217 (1959), holding that the state courts of Arizona had no jurisdiction over a suit by a non-Indian trader, who operated a general store on the Navajo Reservation under a license from the Commissioner of Indian Affairs, against a Navajo Indian and his wife to collect for goods sold them on credit on the Reservation. Quoting from *Worcester* v. *Georgia*, 31 U. S. (6 Pet.) 515, 561 (1832), the Court stated:

> "'The Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.'" 358 U. S. at 219.

The Court went on to say in *Williams* v. *Lee*:

> "Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in Worcester the broad principles of that decision came

> to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained." 358 U. S. at 219 (footnotes omitted).

Thus the Court has consistently held that Indian tribes are at least quasi-sovereign and are not subject to the jurisdiction of state courts unless authority is expressly granted by Congress. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506 (1940).

Although the Special Master has held that uses by Indians of Colorado River water in Arizona are to be charged to Arizona's total entitlement (Rep. 247-48), the state has no jurisdiction to supervise this Indian use and therefore cannot take any steps to prevent waste of water or to insure that this water is put to economical and beneficial use. While Reservation Indians are citizens of the state, they are immune from the operation of state law. The reasons which impelled the Court to apply equitable apportionment principles in controversies between states are equally applicable in the allotment of Colorado River water between Reservation Indians in Arizona and the other citizens of the state.

Moreover, if a contest between sovereigns is a basic essential for an equitable apportionment of water, the contest here is between the United States, as representative of Reservation Indians and legal owner of Reservation lands, on the one hand, and the State of Arizona, on the other—two sovereign governments.

B. Applicability of Equitable Apportionment

The doctrine of equitable apportionment, as applied to interstate streams, has been developed by this Court in a

series of decisions beginning with *Missouri* v. *Illinois,* 180 U. S. 208 (1901). Throughout the period of this development the Court has regarded the doctrine as flexible and designed to do justice to the conflicting claims of adjoining states, when the asserted water rights of one state cannot be wholly satisfied without some injury to the other. Thus, principles of equitable apportionment have been applied to disputes between states in a case where both states adhere to the doctrine of prior appropriation, *Wyoming* v. *Colorado,* 259 U. S. 419 (1922), or when both follow the rule of riparian rights, *Connecticut* v. *Massachusetts,* 282 U. S. 660 (1931); and the doctrine has also been invoked when one state applies the riparian rule and the other the appropriation doctrine, *Kansas* v. *Colorado,* 206 U. S. 46 (1907). In *Kansas* v. *Colorado* the Court stated the essential principles underlying the doctrine of equitable apportionment thus:

> "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri* v. *Illinois, supra,* the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them." 206 U. S. at 97-98.

Again, in *New Jersey* v. *New York,* 283 U. S. 336, 343 (1931), Mr. Justice Holmes, speaking for the Court, stated:

> "The different traditions and practices in different parts of the country may lead to varying results but

> the effort always is to secure an equitable apportionment without quibbling over formulas."

The basic principle is stated as follows in *Colorado* v. *Kansas*, 320 U. S. 383, 393-94 (1943):

> "And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."

The latest equitable apportionment case decided by this Court was *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945), where Mr. Justice Douglas summarized the holdings in the previous cases:

> "But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjust-

ment of interests which must be made." 325 U. S. at 618.

Although the doctrine of prior appropriation has applied in Arizona ever since it was a part of Mexico, *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U. S. 339 (1909), the United States has never attempted to establish the existence of appropriative rights in the Indian Reservations in question under territorial or state law. Therefore, the present controversy is not one between two appropriation states, as in *Wyoming* v. *Colorado, supra,* but involves the claims of a sovereign state which applies the appropriation rule on the one hand, and on the other the claims of a sovereign (United States) or a quasi-sovereign (Indian tribes) which does not rely upon principles of prior appropriation. Under these circumstances, we believe that in seeking a solution to this problem the Court must look to the other "relevant factors" referred to by Mr. Justice Douglas in *Nebraska* v. *Wyoming, supra.*

C. Equitable Considerations

The inadequate case made by the United States as to the Reservations here involved presented the Special Master with a difficult choice. Ignoring the plain teaching of the *Walker River* case, which is implicit in this Court's decision in *Winters*, that proof of present and prospective Indian needs controls the determination of the quantity of water allowed, even when the reservation theory is applied, the United States made no attempt whatever to show the number of Indians who are now or may be expected to be in the future dependent upon the Reservations for their livelihood nor the amount of water which is or will be reasonably required for their needs.

If the reservation theory, even as expanded by the Master, be accepted, nevertheless the water reserved is not insulated from the exercise by this Court of its equitable powers fairly to apportion it between the competing sovereigns. We can see no reason why rights predicated on the legal fiction of an implied reservation of water should be less subject to the Court's equitable powers than a right gained through actual application of water to beneficial use under state law. This Court has not hesitated in an equitable apportionment case to subordinate prior perfected rights to junior rights when warranted by the equities of the case. *Nebraska* v. *Wyoming, supra.* In fact, the Special Master here did this very thing in deciding the conflicting claims to water of the Gila River System (Rep. 324-30).

We suggest that the following "relevant factors" should be considered in arriving at an equitable apportionment between Reservation Indians and other water users in Arizona.

(1) Fort Mohave Indian Reservation

As we have seen, no Indians presently reside on the Arizona portion of this Reservation nor are there plans to settle any there (pp. 166-69, *supra*).

The soil survey of the Fort Mohave Indian Reservation (US 1318, 1321) discloses that, of the total acres within Arizona which are classified as "irrigable", 4,775 are Class IV lands and 7,600 acres are Class III lands.[96] In other

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[96] Classes III and IV were described as follows (C 2606, pp. 8-9; Tr. 13854-55):

> "CLASS III—Moderately good land that can be used regularly for crops in a good rotation but needs intensive treatments; or complex farming practices for permanent use; subject to severe limitations in use or severe risks of

words, of the 14,916 acres of Reservation land in Arizona found by the Master to be irrigable (Rep. 281), over 12,000 are either "subject to severe limitations in use" (Class III), or can only "be cultivated occasionally" (Class IV).

Further, a great percentage of the Fort Mohave Reservation lands in Arizona which are classed as irrigable are "checkerboard" holdings (US 1318) with alternate sections in private ownership (pp. 149-50, *supra*). This crazy-quilt pattern of ownership necessarily makes development of the lands difficult and expensive.

(2) Colorado River Indian Reservation

On the Colorado River Indian Reservation, large acreages are also marginal. Of the aggregate of 107,588 acres of irrigable land within the Reservation as found by the Master (Rep 272), there are 32,626 acres in Class III and 26,670 acres in Class IV (US 561). In addition, mesa land is widely interspersed with nonirrigable land (US 561), rendering irrigation difficult and expensive. The present uses and development on this Reservation (pp. 179-80, *supra*) are more than adequate for the reasonable needs, present and foreseeable, of its Indian occupants. Indeed,

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damage, because of permanent land characteristics. Examples of Class III are: moderately steep slopes, high susceptibility to erosion, excessive wetness, moderate to severe alkali and salinity, shallow to inhibitory layers, very heavy or very light textures, and low inherent fertility.

"CLASS IV—Fairly good land that is best maintained in perennial vegetation, but can be cultivated occasionally, if handled with great care; subject to very severe permanent limitations or hazards in use for cropland. Examples of Class IV lands are: Steep slopes, very high susceptibility to erosion, excessive wetness or continuing hazards of water-logging, very light and coarse to very heavy textured soil profiles, very shallow and very low inherent fertility."

the Indians themselves are farming less than 40% of the approximately 40,000 acres which historically have been irrigated (p. 180, *supra*). Thus, the presently irrigated acreage will permit more than a 150% increase in Indian use to meet any expansion in need that may occur.

(3) Cocopah Indian Reservation

The Special Master has found that there are 431 irrigable acres in the Cocopah Indian Reservation, which, together with related uses, have a maximum annual diversion requirement of 2,744 acre-feet (Rep. 268). He has also found that the 1957 population of the tribe was about 90 Indians (Rep. 88).

It so happens that the irrigable acreage criterion, as applied to this Reservation, will not result in allotting to these Indians a quantity of water exceeding their needs.

(4) Non-Indian Needs in Arizona

The needs of non-Indian users in Arizona are such that every drop of available water must be conserved and put to beneficial use. Arizona of necessity must rely on the Colorado River for water not only to preserve its existing economy but to meet the mounting needs of its exploding population.

In 1956, during the hearings before the Master, Arizona's population was estimated at 1,060,000. Phoenix then had an estimated population of 165,000 and Tucson 85,000 (A 134, p. 7). It was expected that by 1965 the state's population would increase to 1,500,000 (Tr. 1020). However, as the 1960 census shows, the state's population is 1,302,161 the population of Phoenix is 439,170 and that of Tucson 212,892. Arizona ranks first in the nation in all major cat

gories of percentage growth in population since World War II (Tr. 1014; A 134). Unquestionably, her population will far exceed the 2,000,000 predicted in 1956 for 1975 (Tr. 1020).

Water must be provided not only for the domestic needs of this multitude of new citizens but also to meet the demands of the gigantic industrial growth which is taking place.

Taking one year as an example, in 1955 Arizona's agricultural, manufacturing and mining industries grossed over one billion dollars (Tr. 1021). Retail sales also exceeded one billion (Tr. 1021-22) and there was over $300,000,000 in new construction (Tr. 1022). Present day statistics would undoubtedly show further growth in these areas proportionate to the population increase established by the 1960 census.

While the economy of the state has been thus booming, the water supply has been becoming increasingly inadequate. In 1952, there were 923,000 acres in irrigated cultivation in Maricopa and Pinal Counties and in the Safford, Duncan and San Pedro areas, which comprise the major irrigated areas of the state, except for Yuma County, which has access to the main stream of the Colorado River for its water supply. In 1955, this irrigated acreage had decreased to 822,000 acres. Approximately 50,000 acres have been going out of cultivation yearly due to falling water tables. Unless a supplemental water supply is found, another 300,000 acres will go out of cultivation (Tr. 1483).

Since 1940 the water table has dropped in the Salt River Valley basin, the major irrigated area in the state utilizing both surface and ground water, an average of 68 feet (Tr. 1292). In the Eloy area in Pinal County it has dropped 85 feet (Tr. 1278) and in the Maricopa-Stanfield area 80 feet (Tr. 1280). From 1930 to 1954, there was a drop of

82 feet in the Mesa, Chandler, Tempe Area (Tr. 1290) and 85 feet in the Queen Creek, Higley, Gilbert area (Tr. 1290).[97] Other areas have suffered lesser lowering of the water table but it has been substantial in all irrigated areas (Tr. 1299-1300).

When the water required for salt balance is added to the problem of inflow required to satisfy the needs of these areas, the emergency which confronts Arizona becomes even more serious. Presently there is available no water to maintain salt balance. If it is not provided, large additional acreages in the lower end of the Salt River Valley basin will ultimately be "salted out" (Tr. 1283, 1295).

Surely, in the face of this grave situation, it is not without good reason that Arizona urgently requests the Court to consider and weigh the needs of all her citizens, Indians and non-Indians alike, to counter-balance the genuine water requirements of each, and, in measuring the extent of the rights of Reservation Indians in Colorado River water, to make an apportionment that is truly equitable—that is, an allowance of an amount of water, but no more than the amount, that will serve to meet adequately the present and reasonably foreseeable needs of the Indians themselves.

VII

In withdrawing public lands for the Gila National Forest the United States did not reserve water from the Gila and San Francisco Rivers for use in the forest.

The right of the United States to use the water of the Gila and San Francisco Rivers for the purposes of the Gila National Forest is the only disputed item in the disposition

[97] A 116 shows the geographical location of these areas.

of the claims made by Arizona, New Mexico and the United States to the water of the Gila River System (A Exc. 29-30) (pp. 5-6, *supra*).

The Special Master found that the Gila National Forest was created by presidential proclamation dated March 2, 1899 and enlarged and modified by later proclamations (Rep. 342). Since there was evidence that the United States diverts water for the Gila National Forest from the main stream of the Gila and San Francisco Rivers, the Special Master held that the claims of the United States with respect to its right to divert water for the purposes of this federal establishment should be decided. Although the Master found that there is not sufficient evidence from which to make a determination of the ultimate water requirements of the Gila National Forest (Rep. 342), he did find that in withdrawing lands for the Gila National Forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the forest (Rep. 342). He concludes that the United States has the right to divert water from the main stream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used (Rep. 343). He also holds that those rights in the Gila River System which are recognized by the Recommended Decree, to the extent that they are junior in time, are subordinate to the rights of the United States to divert water for the Gila National Forest (Rep. 335).

The Special Master reasons that the purposes of the forest cannot be fulfilled without an adequate water supply and hence that the United States must have intended to

reserve water in quantities reasonably necessary to fulfill the purposes for which the forest lands were withdrawn (Rep. 335). He then concludes that the power of the United States to make this reservation of water "cannot be logically differentiated from the power of the United States with respect to Indian Reservations and Recreational Areas" (Rep. 335).

Although Arizona is not in agreement with the conclusion of the Special Master that the United States possesses the power to reserve water of the Gila and San Francisco Rivers for use in national forests, it is not necessary that this question be resolved here, since it is clear that the Master erred in his finding of an intent to reserve water for national forest purposes.

By the Act of March 3, 1891[98] Congress authorized the President to set apart and reserve as national forests any part of the public lands covered wholly or partially with timber or undergrowth. Section 18 of the Act provided:

> "That the right of way through the public lands and *reservations* of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of

[98] 26 Stat. 1101.

such canal or ditch: *Provided,* That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, *and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.*"

The Act of June 4, 1897[99] contains the following provisions regarding the use of waters within national forests:

> "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

From 1936 to 1944, funds were appropriated by Congress for the purchase and establishment by the Forest Service of water rights for use on the national forests.[100] The Act of September 21, 1944[101] authorized appropriations for that purpose as follows:

> "There are hereby authorized to be appropriated for expenditure by the Forest Service such sums as may be necessary for the investigation and establishment of water rights, including the purchase thereof or of lands or interests in lands or rights-of-way for

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[99] 30 Stat. 36.

[100] 49 Stat. 1438 (1936); 50 Stat. 412 (1937); 52 Stat. 727 (1938); 53 Stat. 956 (1939); 54 Stat. 547 (1940); 55 Stat. 423 (1941); 56 Stat. 680 (1942); 57 Stat. 412 (1943).

[101] 58 Stat. 737, 16 U. S. C. §526 (1958).

use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forests."

In its discussion of the 1936 Appropriation Act, the House Committee stated:

> "*Water rights.*—The committee has included a new item, not in the Budget, to enable the Forest Service to investigate the needs for and acquire water rights for the national forests."[102]

And with reference to the 1939 Act the House Committee Report stated:

> "*Water rights.*—An appropriation of $10,000 was provided by the committee 2 years ago and continued last year in the same amount for perfecting water rights in the national forests. Under these appropriations a total of 257 filings and land-purchase actions will have been completed by the end of the current fiscal year, all within the Colorado River drainage basin. It is estimated that 619 additional actions in that basin will be required and that 1,000 actions in national-forest territory outside the Colorado River Basin will be required—all at a total estimated additional cost of $110,400. *In view of the importance of filing on water rights before possible adverse claimants, the committee has increased the appropriation in the accompanying bill to $20,000.*"[103]

This legislation, beginning with the Act of March 3, 1891 authorizing the establishment of national forests, evidences the intent of Congress not to interfere with the

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[102] H. R. Rep. No. 2061, 74th Cong., 2d Sess. 9 (1936).

[103] H. R. Rep. No. 2130, 75th Cong., 3d Sess. 10 (1938).

control of water for irrigation and other purposes under authority of the states or territories. The Act of June 4, 1897 specifically authorizes the use of *all* water within national forests under the laws of the states in which the forests are situated. Certainly, the repeated appropriation of funds for the establishment and purchase of water rights by the Forest Service and the recognition by Congress of the importance of filing on water rights by the Forest Service before filing by adverse claimants is wholly incompatible with the notion that the United States intended to and did reserve such water at the time the national forests were created.

The department of the national government entrusted with the management and control of the national forests has "for nearly half a century" administratively construed these enactments as evidencing the intent of Congress that rights to the use of water for national forest purposes shall be obtained in accordance with state law.

The Forest Service Manual states:

> "*2514.1—Policy.* The rights to use water for national forest purposes will be obtained in accordance with State law. This policy is based on the act of June 4, 1897 (16 U. S. C. 481), which reads, in part, as follows:
>
> 'All waters within the boundaries of the national forests may be used for domestic, mining, milling, or irrigation purposes under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.'
>
> "*2514.2—Authority.* Departmental authority to secure water rights under State laws is confirmed

by the Department of Agriculture Organic Act of September 21, 1944 (58 Stat. 734).

The Assistant Secretary of Agriculture advised Congress in 1956 that:

> "For example, it has been the firmly established policy of this Department for nearly half a century to acquire, in strict accordance with State laws and procedures, the water rights needed for the administration of the national forests."[104]

None of this material was presented to the Special Master. Had it been brought to his attention, he could hardly have found that the United States, in withdrawing public land for the Gila National Forest, intended that water be automatically reserved for the forest.

The conclusion of the Special Master, that the United States is entitled to priorities as of the date of withdrawal of each area of the forest within which the water is used (Rep. 343) and that other uses from the Gila River System recognized by the Recommended Decree, to the extent that they are junior in time, are subordinate to the rights of the United States (Rep. 335), is not feasible of implementation. Priority dates were not fixed for other uses in Arizona or New Mexico, and in fact the basis of the rights recommended for New Mexico is satisfaction of present uses in disregard of senior rights in Arizona (Rep. 325-27).

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[104] Hearings Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs on S. 863, 84th Cong., 2d Sess. 179 (1956). See also *id.* at 177-78.

CONCLUSION

The Report and Recommended Decree of the Special Master should be adopted by the Court, with the modifications requested by Arizona.

Respectfully submitted,

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May 22, 1961
Phoenix, Arizona

APPENDIX A

Colorado River Compact

APPENDIX A

Colorado River Compact

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a compact under the Act of the Congress of the United States of America approved August 19, 1921 (42 Statutes at Large, page 171), and the Acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners:

W. S. Norviel for the State of Arizona
W. F. McClure for the State of California
Delph E. Carpenter for the State of Colorado
J. G. Scrugham for the State of Nevada
Stephen B. Davis, Jr., for the State of New Mexico
R. E. Caldwell for the State of Utah
Frank C. Emerson for the State of Wyoming

who, after negotiations participated in by Herbert Hoover appointed by The President as the representative of the United States of America, have agreed upon the following articles:

Article I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

Appendix A

ARTICLE II

As used in this compact—

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah, and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California, and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to The President of the United States of America, and it shall be the duty of the Governors of the signatory States and of The President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water.

ARTICLE V

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall cooperate, ex-officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption, and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works

within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

ARTICLE IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

Appendix A

ARTICLE X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

DONE at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. One Thousand Nine Hundred and Twenty-two.

(Signed) W. S. NORVIEL.
(Signed) W. F. MCCLURE.
(Signed) DELPH E. CARPENTER.
(Signed) J. G. SCRUGHAM.
(Signed) STEPHEN B. DAVIS, JR.
(Signed) R. E. CALDWELL.
(Signed) FRANK C. EMERSON.

Approved:

(Signed) HERBERT HOOVER.

APPENDIX B

Boulder Canyon Project Act

APPENDIX B

Boulder Canyon Project Act

[45 STAT. 1057 (1928), 43 U. S. C. §§617-617t (1958)]

AN ACT To provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtentant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside

of the Imperial and Coachella Valleys: *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, and other property necessary for said purposes.

SEC. 2. (a) There is hereby established a special fund, to be known as the "Colorado River Dam fund" (hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this Act. All revenues received in carrying out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this Act, except that the aggegate amount of such advances shall not exceed the sum of $165,000,000. Of this amount the sum of $25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act. If said sum of $25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall

be paid annually out of the fund, except as herein otherwise provided.

(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest, during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

SEC. 3. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this Act, not exceeding in the aggregate $165,000,000.

Appendix B

SEC. 4. (a) This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, *mentioned* in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benfit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus

waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

Appendix B

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues.

SEC. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and

delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions

at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

Appendix B

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

Appendix B

SEC. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act of penalizing failure to comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised

or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this Act shall become effective as provided in section 4 herein.

SEC. 7. That the Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may by acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

SEC. 8. (a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water

stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

SEC. 9. All lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall

be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided,* That all persons who served in the United States Army, Navy, Marine Corps, or Coast Guard during World War II, the War with Germany, the War with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4 of the Act of December 5, 1924 (43 Stat. 672, 702; 43 U. S. C., sec. 433); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this chapter: *Provided further,* That the above exclusive preference rights shall apply to veteran settlers on lands watered from the Gila canal in Arizona the same as to veteran settlers on lands watered from the All-American canal in California: *Provided further,* That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said

sixty-day period such lands shall be open to entry, subject to the preference in this section provided.[1]

SEC. 10. That nothing in this Act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this Act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

SEC. 11. That the Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley reclamation project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the same; and the appropriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions, and recommendations regarding such project.

SEC. 12. "Political subdivision" or "political subdivisions" as used in this Act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this Act shall be understood to mean that certain Act of the Congress of the

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[1] As amended by the Act of March 6, 1946 (60 Stat. 36).

United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and the Acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal Water Power Act," as used in this Act, shall be understood to mean that certain Act of Congress of the United States approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," and the Acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this Act shall include water uses defined as "domestic" in said Colorado River compact.

SEC. 13. (a) The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter

approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights-of-way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this Act, the Federal Water Power Act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact.

(d) The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right-of-way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

Appendix B

SEC. 14. This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

SEC. 15. The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this Act, for such purposes.

SEC. 16. In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this Act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

SEC. 17. Claims of the United States arising out of any contract authorized by this Act shall have priority over all others, secured or unsecured.

SEC. 18. Nothing herein shall be construed as interfering with such rights as the States now have either to the

waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

SEC. 19. That the consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River compact and consistent with this Act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion, and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, division of water, or other purposes and/or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and/or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

SEC. 20. Nothing in this Act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

SEC. 21. That the short title of this Act shall be "Boulder Canyon Project Act."

APPENDIX C

California Limitation Act

APPENDIX C

California Limitation Act

(Act of March 4, 1929; Ch. 16, 48th Sess.; Statutes and Amendments to the Codes, 1929, pp. 38-39)

CHAPTER 16

An act to limit the use by California of the waters of the Colorado river in compliance with the act of congress known as the "Boulder canyon project act," approved December 21, 1928, in the event the Colorado river compact is not approved by all of the states signatory thereto

(Approved by the Governor March 4, 1929; in effect August 14, 1929)

The people of the State of California do enact as follows:

SECTION 1. In the event the Colorado river compact signed at Santa Fe, New Mexico, November 24, 1922, and approved by and set out at length in that certain act entitled "An act to ratify and approve the Colorado river compact, signed at Santa Fe, New Mexico, November 24, 1922, to repeal conflicting acts and resolutions and directing that notice be given by the governor of such ratifications and approval," approved January 10, 1929 (statutes 1929, chapter 1), is not approved within six months from the date of the passage of that certain act of the congress of the United States known as the "Boulder canyon project act," approved December 21, 1928, by the legislatures of each of the seven states signatory thereto, as provided by article eleven of the said Colorado river compact, then when six of said states, including California, shall have ratified and approved said compact, and shall have consented to waive the provisions of the first paragraph of article eleven of said compact which makes the same binding and obligatory when

approved by each of the states signatory thereto, and shall have approved said compact without conditions save that of such six states' approval and the President by public proclamation shall have so declared, as provided by the said "Boulder canyon project act," the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming as an express covenant and in consideration of the passage of the said "Boulder canyon project act" that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado river for use in the State of California including all uses under contracts made under the provisions of said "Boulder canyon project act," and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph "a" of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

SEC. 2. By this act the State of California intends to comply with the conditions respecting limitation on the use of water as specified in subdivision 2 of section 4 (a) of the said "Boulder canyon project act" and this act shall be so construed.

APPENDIX D

General Regulations Governing Contracts for the Storage of Water in Boulder Canyon Reservoir, and the Delivery Thereof

APPENDIX D

General Regulations Governing Contracts for the Storage of Water in Boulder Canyon Reservoir, and the Delivery Thereof

1. No person shall have or be entitled to have the use for any purpose of the water stored in Boulder Canyon Reservoir except by contract made in pursuance of these regulations. All contracts for delivery of water shall be subject to all the terms and provisions of the Colorado River Compact and of the Boulder Canyon Project Act.

2. The right is reserved to amend or extend these regulations from time to time consistently with said compact and the laws of Congress, as the public need may require.

3. Storage water in Boulder Canyon Reservoir will be delivered upon such terms and conditions as the Secretary may fix from time to time by regulations and contracts thereunder. Water so contracted for may be delivered at such points on the river as may be agreed upon for irrigation and domestic uses.

4. Contracts respecting water for irrigation and domestic uses shall be for permanent service, and shall conform to Paragraph a of Section 4 of the Boulder Canyon Project Act.

5. No charge shall be made for water or for the use, storage or delivery of water for irrigation or for water for potable purposes in the Imperial and Coachella Valleys. Charges otherwise shall be fixed by regulation from time to time. Where water is permitted by the Secretary to be taken from the Colorado River from the reservoir above the Hoover Dam, the utilization of the power plant will be impaired to that extent, and the right is reserved to make

a higher charge for water taken above the dam, than if delivery is made below the dam.

6. Subject to the provisions of Article 7 of these regulations, deliveries of water to users in California shall be in accordance with the following recommendation of the State Division of Water Resources:

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

SECTION 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

SECTION 2. A second priority to Yuma Project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

SECTION 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre feet of water per annum less the beneficial consumptive use under the priorities

designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2 and 3 of this article shall not exceed 3,850,000 acre feet of water per annum.

SECTION 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum.

SECTION 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

SECTION 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

SECTION 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

Appendix D

SECTION 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

SECTION 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations

between the said City and/or said County and such users resulting therefrom.

SECTION 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusions of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

SECTION 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

SECTION 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties.

7. The Secretary reserves the right to contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation District is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement or determination; *Provided,* that priorities numbered fourth and fifth in said recommendation shall not thereby be disturbed.

(Signed) RAY LYMAN WILBUR,
Secretary of the Interior.

Issued April 23, 1930;
Amended September 28, 1931

APPENDIX E

Arizona Contract of February 9, 1944

APPENDIX E

Arizona Contract of February 9, 1944

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ARIZONA-CALIFORNIA-NEVADA

CONTRACT FOR DELIVERY OF WATER

THIS CONTRACT made this 9th day of February 1944 pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplemental thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA, hereinafter referred to as "United States," acting for this purpose by Harold L. Ickes, Secretary of the Interior, hereinafter referred to as the "Secretary," and the STATE OF ARIZONA, hereinafter referred to as "Arizona," acting for this purpose by the Colorado River Commission of Arizona, pursuant to Chapter 46 of the 1939 Session Laws of Arizona,

Witnesseth that:

EXPLANATORY RECITALS

2. Whereas for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters for the reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary acting under and in pursuance of the provisions of the Colorado River Compact and Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, has

constructed and is now operating and maintaining in the main stream of the Colorado River at Black Canyon that certain structure known as and designated Boulder Dam and incidental works, creating thereby a reservoir designated Lake Mead of a capacity of about thirty-two million (32,000,000) acre-feet; and

3. Whereas said Boulder Canyon Project Act provides that the Secretary, under such general rules and regulations as he may prescribe, may contract for the storage of water in the reservoir created by Boulder Dam, and for the delivery of such water at such points on the river as may be agreed upon, for irrigation and domestic uses, and provides further that no person shall have or be entitled to have the use for any purpose of the water stored, as aforesaid, except by contract made as stated in said Act; and

4. Whereas it is the desire of the parties to this contract to contract for the storage of water and the delivery thereof for irrigation of lands and domestic uses within Arizona; and

5. Whereas nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes:

6. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER

7. (a) Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall deliver and Arizona, or agencies or water users therein, will accept under this contract each calendar year from

storage in Lake Mead, at a point or points of diversion on the Colorado River approved by the Secretary, so much water as may be necessary for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet.

(b) The United States also shall deliver from storage in Lake Mead for use in Arizona, at a point or points of diversion on the Colorado River approved by the Secretary, for the uses set forth in subdivision (a) of this Article, one-half of any excess or surplus waters unapportioned by the Colorado River Compact to the extent such water is available for use in Arizona under said compact and said act, less such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article.

(c) This contract is subject to the condition that Boulder Dam and Lake Mead shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the United States and Arizona, and agencies and water users therein, shall observe and be subject to and controlled by said Colorado River Compact and the Boulder Canyon Project Act in the construction, management, and operation of Boulder Dam, Lake Mead, canals and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other uses.

(d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall

be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

(e) This contract is for permanent service, subject to the conditions stated in subdivision (c) of this Article, but as to the one-half of the waters of the Colorado River system unapportioned by paragraphs (a), (b), and (c) of Article III of the Colorado River Compact, such water is subject to further equitable apportionment at any time after October 1, 1963, as provided in Article III (f) and Article III (g) of the Colorado River Compact.

(f) Arizona recognizes the right of the United States and the State of Nevada to contract for the delivery from storage in Lake Mead for annual beneficial consumptive use within Nevada for agricultural and domestic uses of 300,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact, and in addition thereto to make contract for like use of 1/25 (one twenty-fifth) of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963, as provided in Article III (f) and Article III (g) of the Colorado River Compact.

(g) Arizona recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact, and nothing contained in this contract shall prejudice such rights.

(h) Arizona recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California, provided that the aggregate of all such deliveries and uses in California from the Colorado River shall not exceed the limitation of such uses in that State required by the provisions of the Boulder Can-

yon Project Act and agreed to by the State of California by an act of its Legislature (Chapter 16, Statutes of California of 1929) upon which limitation the State of Arizona expressly relies.

(i) Nothing in this contract shall preclude the parties hereto from contracting for storage and delivery above Lake Mead of water herein contracted for, when and if authorized by law.

(j) As far as reasonable diligence will permit, the water provided for in this contract shall be delivered as ordered and as reasonably required for domestic and irrigation uses within Arizona. The United States reserves the right to discontinue or temporarily reduce the amount of water to be delivered, for the purpose of investigation and inspection, maintenance, repairs, replacements, or installation of equipment or machinery at Boulder Dam, or other dams heretofore or hereafter to be constructed, but so far as feasible will give reasonable notice in advance of such temporary discontinuance or reduction.

(k) The United States, its officers, agents, and employees shall not be liable for damages when for any reason whatsoever suspensions or reductions in the delivery of water occur.

(*l*) Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisions therein of Arizona as may contract therefor with the Secretary, and as may qualify under the Reclamation Law or other federal statutes or to lands of the United States within Arizona. All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract. Present

perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract.

(m) Rights-of-way across public lands necessary or convenient for canals to facilitate the full utilization in Arizona of the water herein agreed to be delivered will be granted by the Secretary subject to applicable federal statutes.

POINTS OF DIVERSION: MEASUREMENTS OF WATER

8. The water to be delivered under this contract shall be measured at the points of diversion, or elsewhere as the Secretary may designate (with suitable adjustment for losses between said points of diversion and measurement), by measuring and controlling devices or automatic gauges approved by the Secretary, which devices, however, shall be furnished, installed, and maintained by Arizona, or the users of water therein, in manner satisfactory to the Secretary; said measuring and controlling devices or automatic gauges shall be subject to the inspection of the United States, whose authorized representatives may at all times have access to them, and any deficiencies found shall be promptly corrected by the users thereof. The United States shall be under obligation to deliver water only at diversion points where measuring and controlling devices or automatic gauges are maintained, in accordance with this contract, but in the event diversions are made at points where such devices are not maintained, the Secretary shall estimate the quantity of such diversions and his determination thereof shall be final.

CHARGES FOR STORAGE AND DELIVERY OF WATER

9. No charge shall be made for the storage or delivery of water at diversion points as herein provided necessary to supply present perfected rights in Arizona. A charge of 50¢ per acre-foot shall be made for all water actually diverted directly from Lake Mead during the Boulder Dam

cost repayment period, which said charge shall be paid by the users of such water, subject to reduction by the Secretary in the amount of the charge if it is concluded by him at any time during said cost-repayment period that such charge is too high. After expiration of the cost-repayment period, charges shall be on such basis as may hereafter be prescribed by Congress. Charges for the storage or delivery of water diverted at a point or points below Boulder Dam, for users, other than those specified above, shall be as agreed upon between the Secretary and such users at the time of execution of contracts therefor, and shall be paid by such users; provided such charges shall, in no event, exceed 25¢ per acre-foot.

RESERVATIONS

10. Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III (a) of the Colorado River Compact; (3) what part, if any, is within Article III (b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system; provided, however, that by these reservations there is no intent to disturb the apportionment made by Article III (a) of the Colorado River Compact between the Upper Basin and the Lower Basin.

DISPUTES AND DISAGREEMENTS

11. Whenever a controversy arises out of this contract, and if the parties hereto then agree to submit the matter to

arbitration, Arizona shall name one arbitrator and the Secretary shall name one arbitrator and the two arbitrators thus chosen shall meet within ten days after their selection and shall elect one other arbitrator within fifteen days after their first meeting, but in the event of their failure to name the third arbitrator within thirty days after their first meeting, such arbitrator not so selected shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Tenth Circuit. The decision of any two of the three arbitrators thus chosen shall be a valid and binding award.

RULES AND REGULATIONS

12. The Secretary may prescribe and enforce rules and regulations governing the delivery and diversion of waters hereunder, but such rules and regulations shall be promulgated, modified, revised or extended from time to time only after notice to the State of Arizona and opportunity is given to it to be heard. Arizona agrees for itself, its agencies and water users that in the operation and maintenance of the works for diversion and use of the water to be delivered hereunder, all such rules and regulations will be fully adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

13. This contract is made upon the express condition and with the express covenant that all rights of Arizona, its agencies and water users, to waters of the Colorado River and its tributaries, and the use of the same, shall be subject to and controlled by the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to the Act of Congress approved August 19, 1921 (42 Stat. 171), as approved by the Boulder Canyon Project Act.

Appendix E

EFFECTIVE DATE OF CONTRACT

14. This contract shall be of no effect unless it is unconditionally ratified by an Act of the Legislature of Arizona, within three years from the date hereof, and further, unless within three years from the date hereof the Colorado River Compact is unconditionally ratified by Arizona. When both ratifications are effective, this contract shall be effective.

INTEREST IN CONTRACT NOT TRANSFERABLE

15. No interest in or under this contract, except as provided by Article 7(*l*), shall be transferable by either party without the written consent of the other.

APPROPRIATION CLAUSE

16. The performance of this contract by the United States is contingent upon Congress making the necessary appropriations for expenditures for the completion and the operation and maintenance of any dams, power plants or other works necessary to the carrying out of this contract, or upon the necessary allotments being made therefor by any authorized federal agency. No liability shall accrue against the United States, its officers, agents, or employees by reason of the failure of Congress to make any such appropriations or of any federal agency to make such allotments.

MEMBER-OF-CONGRESS CLAUSE

17. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

Appendix E

DEFINITIONS

18. Wherever terms used herein are defined in Article II of the Colorado River Compact or in Section 12 of the Boulder Canyon Project Act, such definitions shall apply in construing this contract.

19. In witness whereof the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By (s) HAROLD L. ICKES,
Secretary of the Interior.

STATE OF ARIZONA, acting by and through its COLORADO RIVER COMMISSION,

By (s) HENRY S. WRIGHT, *Chairman.*

By (s) NELLIE T. BUSH, *Secretary.*

Approved this 11th day of February 1944:

(s) SIDNEY P. OSBORN,
Governor of the State of Arizona.

APPENDIX F

Nevada Contract of March 30, 1942

APPENDIX F

Nevada Contract of March 30, 1942

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ARIZONA-CALIFORNIA-NEVADA

CONTRACT FOR DELIVERY OF WATER

1. THIS CONTRACT, made this 30th day of March, nineteen hundred forty-two, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA (hereinafter referred to as "United States"), acting for this purpose by Abe Fortas, Acting Secretary of the Interior (hereinafter referred to as the "Secretary"), and the STATE OF NEVADA, a body politic and corporate, and its Colorado River Commission (said Commission acting in the name of the State, but as principal in its own behalf as well as in behalf of the State; the term State as used in this contract being deemed to be both the State of Nevada and its Colorado River Commission), acting in pursuance of an act of the Legislature of the State of Nevada, entitled "An Act creating a commission to be known as the Colorado river commission of Nevada, defining its powers and duties, and making an appropriation for the expenses thereof, and repealing all acts and parts of acts in conflict with this act," approved March 20, 1935 (Chapter 71, Stats. of Nevada, 1935);

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Witnesseth that:

EXPLANATORY RECITALS

2. Whereas for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters for the reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, acting under and in pursuance of the provisions of the Colorado River Compact and the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, has constructed and is now operating and maintaining in the main stream of the Colorado River at Black Canyon that certain structure known as and designated Boulder Dam and incidental works, creating thereby a reservoir designated Lake Mead; and

3. Whereas the State is desirous of entering into a contract for the delivery to it of water from Lake Mead:

4. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER BY THE UNITED STATES

5. (a) Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water as may be necessary to supply the State a total quantity not to exceed One Hundred Thousand (100,000) acre-feet each calendar year. The right of the State to contract for the delivery to it from storage in Lake Mead of additional water is not limited by this contract. Said water may be used only within the

State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power.

(b) Water agreed to be delivered to the State hereunder shall be delivered continuously as far as reasonable diligence will permit, but the United States shall not be obligated to deliver water to the State when for any reason, as conclusively but not arbitrarily determined by the Secretary, such delivery would interfere with the use of Boulder Dam or Lake Mead for river regulation, improvement of navigation, flood control, and/or satisfaction of perfected rights, in or to the waters of the Colorado River, or its tributaries, in pursuance of Article VIII of the Colorado River Compact.

(c) The United States reserves the right, for the purpose of investigation, inspection, maintenance, repairs and replacement or installation of equipment or machinery at Boulder Dam, to discontinue temporarily or reduce the amount of water to be delivered hereunder, but so far as feasible the United States will give the State reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents, and employees shall not be liable for damages when, for any reason whatsoever, suspensions or reductions in delivery of water occur.

(d) This contract is for permanent service, and is made subject to the express condition that the State, upon request of the Secretary, shall submit in writing prior to January 1st of any year, an estimate of the amount of water to be required under this contract for the succeeding calendar year.

RECEIPT OF WATER BY THE STATE

6. The State shall receive the water to be diverted by or delivered to it by the United States under the terms hereof

at the point or points of delivery to be hereafter designated as stated in the next preceding article hereof, and shall perform all acts required by law or custom in order to maintain control over such water and to secure and maintain its lawful use and proper diversion from Lake Mead. The diversion and conveyance of such water to places of use shall be without expense to the United States.

MEASUREMENT OF WATER

7. The water to be delivered to the State hereunder shall be measured at the point or points of diversion from Lake Mead, or at such point or points in any works used by the State to convey water from Lake Mead to its place or places of use as shall be satisfactory to the Secretary, and by such measuring and controlling devices or such automatic gauges or otherwise as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed, and maintained in manner satisfactory to the Secretary, by and at the expense of the State, but they shall be and remain at all times under the complete control of the United States. The State's authorized representative shall be allowed access at all times to said measuring and controlling devices or automatic gauges.

RECORD OF WATER DIVERTED

8. The State shall make full and complete written monthly reports as directed by the Secretary on forms to be supplied by the United States of all water delivered to or diverted by the State from Lake Mead. Such reports shall be made by the fifth day of the month immediately succeeding the month in which the water is diverted.

CHARGE FOR DELIVERY OF WATER

9. A charge of fifty cents ($.50) per acre-foot shall be made for the diversion by or delivery of water to the State

hereunder during the Boulder Dam cost-repayment period, subject to reduction by the Secretary in the amount of the charge if studies show to his satisfaction that the charge is too high. Thereafter, charges shall be on such basis as may hereafter be prescribed by the Congress. Charges shall be made against the State only for the number of acre-feet of water actually delivered to or diverted by it from Lake Mead.

BILLING AND PAYMENTS

10. The State shall pay monthly for all water delivered to it hereunder, or diverted by it from Lake Mead, in accordance with the charge in Article nine (9) hereof established. The United States will submit bills to the State by the tenth day of each month immediately following the month during which the water is delivered or diverted and payments shall be due on the first day of the month immediately succeeding. If such charges are not paid when due, an interest charge of one per centum (1%) of the amount unpaid shall be added thereto as liquidated damages and, thereafter, as further liquidated damages, an additional interest charge of one per centum (1%) of the principal sum unpaid shall be added on the first day of each succeeding calendar month until the amount due, including such interest, is paid in full.

REFUSAL OF WATER IN CASE OF DEFAULT

11. The United States reserves the right to refuse to deliver water to the State, or to permit water to be diverted by the State from Lake Mead, in the event of default for a period of more than twelve (12) months in any payment due or to become due to the United States under this contract.

INSPECTION BY THE UNITED STATES

12. The Secretary or his representatives shall at all times have the right of ingress to and egress from all

works of the State for the purpose of inspection, repairs, and maintenance of works of the United States, and for all other proper purposes. In each contract made by the State for the redelivery of any part of the water agreed to be delivered to the State hereunder, it shall be provided, for the use and benefit of the United States, that the authorized representatives of the United States shall at all times have access to measuring and controlling devices, or automatic gauges, over the lands and rights of way of the contractee. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the State relating to the diversion and distribution of water delivered to or diverted by the State from Lake Mead with the right at any time during office hours to make copies of or from the same.

RULES AND REGULATIONS

13. There is reserved to the Secretary the right to prescribe and enforce rules and regulations governing the delivery and diversion of water hereunder. Such rules and regulations may be modified, revised, and/or extended from time to time after notice to the State and opportunity for it to be heard, as may be deemed proper, necessary, or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments hereof, or to protect the interests of the United States. The State hereby agrees that in the operation and maintenance of its diversion works and conduits, all such rules and regulations will be fully adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

14. This contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at

Appendix F

Santa Fe, New Mexico, November 24, 1922, pursuant to an Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which compact was approved in section 13 (a) of the Boulder Canyon Project Act.

PRIORITY CLAIMS OF THE UNITED STATES

15. Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

CONTRACT CONTINGENT UPON APPROPRIATIONS

16. This contract is subject to appropriations being made by Congress from time to time of money sufficient to provide for the doing and performance of all things on the part of the United States to be done and performed under the terms hereof, and to there being sufficient money available in the Colorado River Dam Fund for such purposes. No liability shall accrue against the United States, its officers, agents, or employees, by reason of sufficient money not being so appropriated, or on account of there not being sufficient money in the Colorado River Dam Fund for such purposes.

EFFECT OF WAIVER OF BREACH OF CONTRACT

17. All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States. The Waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any provision hereof, or of any other subsequent breach of any provision hereof.

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REMEDIES UNDER CONTRACT NOT EXCLUSIVE

18. Nothing contained in this contract shall be construed as in any manner abridging, limiting, or depriving the United States or the State of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have.

TRANSFER OF INTEREST IN CONTRACT

19. No voluntary transfer of this contract, or of the rights of the State hereunder, shall be made without the written approval of the Secretary; and any successor or assign of the rights of the State, whether by voluntary transfer, judicial sale, trustee's sale, or otherwise, shall be subject to all the conditions of the Boulder Canyon Project Act, and also subject to all the provisions and conditions of this contract to the same extent as though such successor or assign were the original contractor hereunder; provided, that the execution of a mortgage or trust deed, or judicial or trustee's sale made thereunder, shall not be deemed a voluntary transfer within the meaning of this Article.

NOTICES

20. (a) Any notice, demand, or request required or authorized by this contract to be given or made to or upon the United States shall be delivered, or mailed postage prepaid, to the Director of Power, United States Bureau of Reclamation, Boulder City, Nevada, except where, by the terms hereof, the same is to be given or made to or upon the Secretary, in which event it shall be delivered, or mailed postage prepaid, to the Secretary, at Washington, D. C.

(b) Any notice, demand or request required or authorized by this contract to be given or made to or upon the State shall be delivered, or mailed postage prepaid, to the Secretary of the Colorado River Commission of Nevada, Carson City, Nevada.

(c) The designation of any person specified in this article or in any such request for notice, or the address of any such person, may be changed at any time by notice given in the same manner as provided in this article for other notices.

OFFICIALS NOT TO BENEFIT

21. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

UNCONTROLLABLE FORCES

22. Neither party shall be considered to be in default in respect to any obligation hereunder, if prevented from fulfilling such obligation by reason of uncontrollable forces, the term "uncontrollable forces" being deemed, for the purposes of this contract, to mean any cause beyond the control of the party affected, including but not limited to inadequacy of water, failure of facilities, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority, which by exercise of due diligence and foresight, such party could not reasonably have been expected to avoid. Either party rendered unable to fulfill any obligation by reason of uncontrollable forces shall exercise due diligence to remove such inability with all reasonable dispatch.

In witness whereof the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By ABE FORTAS,

Acting Secretary of the Interior.

Appendix F

STATE OF NEVADA, acting by and through its Colorado River Commission,

By E. P. CARVILLE, Chairman.

Attest:

ALFRED MERRITT SMITH, *Secretary.*

By E. P. CARVILLE, *Chairman.*

COLORADO RIVER COMMISSION OF NEVADA,

[SEAL]

Attest:

ALFRED MERRITT SMITH, *Secretary.*

Ratified and approved this 21st day of April 1943.

E. P. CARVILLE,
Governor of the State of Nevada.

[GREAT SEAL OF THE STATE OF NEVADA]

Attest:

MALCOLM MCEACHIN,
Secretary of State.

Approved as to form:

ALAN BIBLE,
Attorney General of Nevada.

[Resolution and certificate omitted.]

APPENDIX G

Nevada Contract of January 3, 1944

APPENDIX G

Nevada Contract of January 3, 1944

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

ARIZONA-CALIFORNIA-NEVADA

SUPPLEMENTAL CONTRACT FOR DELIVERY OF WATER

1. THIS SUPPLEMENTAL CONTRACT made this 3rd day of January nineteen hundred forty-four, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA (hereinafter referred to as "United States"), acting for this purpose by Harold L. Ickes, Secretary of the Interior (hereinafter styled "Secretary"), and STATE OF NEVADA, a body politic and corporate, and its Colorado River Commission (said Commission acting in the name of the State, but as principal in its own behalf as well as in behalf of the State; the term State as used in this supplemental contract being deemed to be both the State of Nevada and its Colorado River Commission), acting in pursuance of an act of the Legislature of the State of Nevada, entitled "An Act creating a commission to be known as the Colorado river commission of Nevada, defining its powers and duties, and making an appropriation for the expenses thereof, and repealing all acts and parts of acts in conflict with this act," approved March 20, 1935 (Chapter 71, Stats. of Nevada, 1935);

Witnesseth:

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EXPLANATORY RECITALS

2. Whereas, under date of March 30, 1942, the parties hereto entered into a contract providing, among other things, for the delivery of water to the State each year, from storage in Lake Mead, subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, so much water as may be necessary to supply the State a total quantity not to exceed One Hundred Thousand (100,000) acre-feet each calendar year, and it is now desired to amend said contract so as to provide for the delivery each calendar year of not to exceed an additional 200,000 acre-feet of water to the State;

3. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER BY THE UNITED STATES

4. Article 5 (a) of the aforesaid contract of date March 30, 1942, is hereby amended to read as follows:

"Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year. Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power."

Appendix G

MODIFICATION OF PRIOR CONTRACT

5. Except as expressly herein amended, the aforesaid contract of date March 30, 1942, shall be and remain in full force and effect.

EFFECTIVE DATE OF SUPPLEMENTAL CONTRACT

6. This supplemental contract shall be of full force and effect immediately upon its execution for and on behalf of the United States.

OFFICIALS NOT TO BENEFIT

7. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

In witness whereof, the parties hereto have caused this supplemental contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By /s/ HAROLD L. ICKES,
Secretary of the Interior.

STATE OF NEVADA, acting by and through its Colorado River Commission,

By /s/ E. P. CARVILLE, *Chairman.*

Attest:

/s/ ALFRED MERRITT SMITH, *Secretary*

Appendix G

COLORADO RIVER COMMISSION OF NEVADA,

By /s/ E. P. CARVILLE, *Chairman.*

Attest:

/s/ ALFRED MERRITT SMITH, *Secretary*

Ratified and approved this 3rd day of January 1944:

/s/ E. P. CARVILLE
Governor of the State of Nevada.

Attest:

/s/ MALCOLM MCEACHIN,
Secretary of State.

Approved as to form:

/s/ ALAN BIBLE,
Attorney General of Nevada.

APPENDIX H

Palo Verde Irrigation District Contract of February 7, 1933

APPENDIX H

Palo Verde Irrigation District Contract of February 7, 1933

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

BOULDER CANYON PROJECT

UNITED STATES AND PALO VERDE IRRIGATION DISTRICT CONTRACT FOR DELIVERY OF WATER

(1) THIS CONTRACT, made this 7th day of February nineteen hundred thirty-three, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the reclamation law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States acting for this purpose by Harold L. Ickes, Secretary of the Interior, hereinafter styled the Secretary, and PALO VERDE IRRIGATION DISTRICT, an irrigation district created, organized, and existing under and by virtue of an act of the Legislature of the State of California approved June 21, 1923 (Chapter 452, Statutes of California, 1923), as amended, known as and designated "Palo Verde irrigation district act", with its principal office at Blythe, Riverside County, California, hereinafter referred to as the District;

Witnesseth:

EXPLANATORY RECITALS

(2) Whereas, for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other

beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water; and

(3) Whereas, after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Hoover Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir; and

(4) Whereas, the District is desirous of entering into a contract for the delivery to it of water from Boulder Canyon Reservoir, and it is to the mutual interest of the parties hereto that such contract be executed and the rights of the District in and to waters of the river be hereby defined.

(5) Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER BY THE UNITED STATES

(6) The United States shall, from storage available in the Boulder Canyon Reservoir, deliver to the District each year at a point in the Colorado River immediately above the District's point of diversion known as Blythe Intake (or as relocated within two miles of the present intake) so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use of the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows (subject to availability thereof for

use in California under the Colorado River Compact and the Boulder Canyon Project Act):

"The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

"SECTION 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

"SEC. 2. A second priority to Yuma Project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

"SEC. 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the 'Lower Palo Verde Mesa,' adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

"SEC. 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los

Angeles. for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum.

"SEC. 5. A fifth priority (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"SEC. 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the 'Lower Palo Verde Mesa,' adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"SEC. 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

"SEC. 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre-feet

in the aggregate) by reason of reducing diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

"SEC. 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulations, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

"SEC. 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

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"SEC. 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

"SEC. 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties."

The Secretary reserves the right to, and the District agrees that he may, contract with any of the allottees above named in accordance with the above stated recommendation. The District reserves the right to establish, at any time, by judicial determination, its rights to divert and/or use water from the Colorado River. In the event the above stated recommendation as to the District is superseded by an agreement between all the above allottees or by a final judicial determination, the parties hereto reserve the right to further contract in accordance with such agreement or such judicial determination; *Provided*, that priorities numbered fourth and fifth shall not thereby be disturbed.

As far as reasonable diligence will permit said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes within the areas for which the District is allotted water as described in the above-stated recommendation. This contract is for permanent water service but is subject to the condition that Hoover Dam and Boulder Canyon Reservoir shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the District and the United States shall observe and be subject to, and

controlled by, said Colorado River Compact in the construction, management, and operation of Hoover Dam, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes. The United States reserves the right to temporarily discontinue or reduce the amount of water to be delivered for the purpose of investigation, inspection, maintenance, repairs, replacements, or installation of equipment and/or machinery at Hoover Dam, but as far as feasible the United States will give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents, and employees shall not be liable for damages when, for any reason whatsoever, suspension or reductions in delivery of water occur. This contract neither prejudices nor admits any claim of the District on account of alleged changes in elevation of the river bed, howsoever caused, or the effect of such alleged changes on the District's diversion of water delivered hereunder. This contract is without prejudice to any other or additional rights which the District may now have not inconsistent with the foregoing provisions of this article, or may hereafter acquire in or to the waters of the Colorado River.

RECEIPT OF WATER BY DISTRICT

(7) The District shall receive the water to be delivered to it by the United States under the terms hereof at the point of delivery above stated, and shall at its own expense convey such water to its distribution system, and shall perform all acts required by law or custom in order to maintain its control over such water and to secure and maintain its lawful and proper diversion from the Colorado River.

MEASUREMENT OF WATER

(8) The water to be delivered hereunder shall be measured at Blythe Intake by such measuring and con-

trolling devices or such automatic gauges or both, as shall be satisfactory to the Secretary. Said measuring and controlling devices, or automatic gauges, shall be furnished, installed, and maintained by and at the expense of the District, but they shall be and remain at all times under the complete control of the United States, whose authorized representatives may at all times have access to them over the land and rights-of-way of the District.

RECORD OF WATER DIVERTED

(9) The District shall make full and complete written reports as directed by the Secretary, on forms to be supplied by the United States, of all water diverted from the Colorado River, and the disposition thereof. The records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

NO CHARGE FOR DELIVERY OF WATER

(10) The District shall not be required to pay to the United States any tolls, rates, or charges of any kind for or on account of the storage or delivery of water hereunder.

INSPECTION BY THE UNITED STATES

(11) The Secretary or his representatives, shall at all times have the right of ingress to and egress from all works of the District for the purpose of inspection, repairs and maintenance of works of the United States, and for all other proper purposes. The Secretary or his representatives shall also have free access at all reasonable times to the books and records of the District relating to the diversion and distribution of water delivered to it hereunder with the right at any time during office hours to make copies of or from the same.

Appendix H

DISPUTES OR DISAGREEMENTS

(12) Disputes or disagreements as to the interpretation or performance of the provisions of this contract shall be determined either by arbitration or court proceedings, the Secretary being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration, the District shall name one arbitrator and the Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within thirty (30) days after their first meeting, such arbitrators not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

RULES AND REGULATIONS

(13) There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract, governing the diversion and delivery of water hereunder to the District and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard, as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments thereof, or to protect the interests of the United States. The District hereby agrees that in the operation and maintenance of its diversion works at Blythe Intake, all such rules and regulations will be fully adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

(14) This contract is made upon the express condition and with the express understanding that all rights based

upon this contract shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes", which compact was approved by the Boulder Canyon Project Act.

PRIORITY OF CLAIMS OF THE UNITED STATES

(15) Claims of the United States arising out of this contract shall have priority over all others, secured or unsecured.

CONTINGENT UPON APPROPRIATIONS

(16) This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work contemplated hereby, and to there being sufficient moneys available in the Colorado River Dam fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents, or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam fund to permit of said allotments. This agreement is also subject to the condition that if for any reason construction of Hoover Dam is not prosecuted to completion with reasonable diligence, then and in such event either party hereto may terminate its obligations hereunder upon one (1) year's written notice to the other party hereto.

RIGHTS RESERVED UNDER SECTION 3737, REVISED STATUTES

(17) All rights of action for breach of any of the provisions of this contract are reserved to the United States as

provided in Section 3737 of the Revised Statutes of the United States.

REMEDIES UNDER CONTRACT NOT EXCLUSIVE

(18) Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States or the District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

INTEREST IN CONTRACT NOT TRANSFERABLE

(19) No interest in this agreement is transferable, and no sublease shall be made, by the District without the written consent of the Secretary, and any such attempted transfer or sublease shall cause this contract to become subject to annulment, at the option of the United States.

MEMBER OF CONGRESS CLAUSE

(20) No Member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

Appendix H

In witness whereof, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By RAY LYMAN WILBUR,
Secretary of the Interior.

Attest:

NORTHCUTT ELY.
RICHARD J. COFFEY.

PALO VERDE IRRIGATION DISTRICT,

By L. A. HAUSER, *President.*

Attest:

O. W. MALMGREN,
Assistant Secretary.

Approved as to form, February 7, 1933:

(Sgd.) RAY LYMAN WILBUR,
Secretary of the Interior.

[Acknowledgments and resolution omitted.]